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## Survey Says ... A Critical Analysis of the New Title IX Policy and a Proposal for Reform

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# Survey Says . . .

## A Critical Analysis of the New Title IX Policy and a Proposal for Reform

*Erin E. Buzuvis\**

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More than thirty years have passed since Congress enacted Title IX, the statute prohibiting sex discrimination by schools, colleges, and universities that receive federal funding.<sup>1</sup> In that time, Congress has confirmed<sup>2</sup>—and reconfirmed<sup>3</sup>—the statute's application to college athletic programs, and the Supreme Court has strengthened the statute's enforcement by construing a private right of action for both injunctive relief<sup>4</sup> and, in certain cases, money damages.<sup>5</sup> Bolstered by these measures, Title IX is duly credited for increasing the number of athletic opportunities for women and girls.<sup>6</sup>

But at the college level, female athletes still have far fewer opportunities to participate in athletics relative to their male peers.<sup>7</sup> At most colleges and universities, the percentage of student athletes who are female is lower than the percentage of female college students.<sup>8</sup> One reason for this is that Title

1. Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681–1688 (2000).

2. Gender and Athletics Act, Pub. L. No. 93-380, § 844, 88 Stat. 484, 612 (1974) (codified at 20 U.S.C. § 1681 (2000)).

3. Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, 102 Stat. 28 (1988) (codified at 20 U.S.C. § 1687 (2000)). This statute expressly provided that Title IX applied to an entire educational institution, regardless of the specific programs receiving federal funds. *Id.* Congress passed this statute to nullify the Supreme Court's interpretation that Title IX only applied to the specific programs receiving federal funds, *Grove City Coll. v. Bell*, 465 U.S. 555, 563–68 (1984), a limitation that effectively insulated from Title IX athletic programs that do not receive any federal funds.

4. See *Cannon v. Univ. of Chi.*, 441 U.S. 677, 717 (1979).

5. *Franklin v. Gwinnett County Pub. Schs.*, 503 U.S. 60, 76 (1992) (allowing a plaintiff to recover money damages when the defendant's violation of Title IX—in that case, an act of sexual harassment—was intentional). See generally *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167 (2005) (extending Title IX's private right of action to include a coach's claim that a school fired him in retaliation for complaining about sex discrimination against his players).

6. SEC'Y OF EDUC.'S COMM'N ON OPPORTUNITY IN ATHLETICS, "OPEN TO ALL": TITLE IX AT THIRTY 13 (Feb. 28, 2003) [hereinafter COMMISSION REPORT], available at <http://www.ed.gov/about/bdscomm/list/athletics/title9report.pdf>. For example, in 1971–1972, the 30,000 women who participated in intercollegiate and college recreational athletics made up 15% of all participants. By 2000–2001, the number of female athletes had increased to 150,000 (a 400% increase). *Id.* at 13.

7. Women generally make up only 42% of all college athletes, while constituting 56% of enrolled undergraduates. COMMISSION REPORT, *supra* note 6, at 13. Moreover, women generally receive 43% of athletic scholarships, and their sports receive 32% of athletic departments' operating budgets. *Id.* at 19. A disparity exists at earlier levels of education as well—about one million fewer girls than boys participate in high school sports. *Id.* at 13–14. The disproportionality at the college level is emphasized here due to this Article's particular focus on new regulatory changes that affect Title IX's application to college and university athletics.

8. See Lee Sigelman & Paul J. Wahlbeck, *Gender Proportionality in Intercollegiate Athletics: The Mathematics of Title IX Compliance*, 80 SOC. SCI. Q. 518, 524, 528 (1999) (noting that only a "handful" of NCAA Division I schools satisfied proportionality compliance); Deborah J. Anderson et al., *Gender Equity in Intercollegiate Athletics: Determinants of Title IX Compliance 3* (Cornell Higher Educ. Research Inst., Working Paper No. 45, 2004), available at [http://www.ilr.cornell.edu/wp/cheri\\_wp45.pdf](http://www.ilr.cornell.edu/wp/cheri_wp45.pdf) (reporting 2001–2002 data that show women are still underrepresented among athletes at most schools; the average proportionality gap

IX and its implementing regulations do not mandate that universities attain substantial proportionality.<sup>9</sup> In fact, the regulatory compliance policy that the Office for Civil Rights (“OCR”)<sup>10</sup> has administered since 1979 allows for three separate and alternative measures (or “prongs”) for complying with Title IX. Universities’ efforts to attain compliance under the proportionality prong are often stymied by budget constraints, perceived or otherwise,<sup>11</sup> that prevent universities from achieving proportionality by simply adding opportunities for women. And while universities could alternatively attain proportionality by capping or reducing athletic opportunities for men,<sup>12</sup> this approach is unpopular among male athletes, their coaches, and their supporters.<sup>13</sup>

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among all schools in the sample was 13%); WOMEN’S SPORTS FOUND., TITLE IX AT 30: ATHLETICS RECEIVE C+ 2 (2002), available at [http://womenssportsfoundation.org/binary-data/WSF\\_ARTICLE/pdf\\_file/902.pdf](http://womenssportsfoundation.org/binary-data/WSF_ARTICLE/pdf_file/902.pdf) (reporting that 23% of “Division I colleges provided athletic opportunities for women within five percentage points of female student enrollment”). The increase in the number of college-bound women has made proportionality compliance an increasingly tall order. COMMISSION REPORT, *supra* note 6, at 13 (noting that women make up 56% of all college undergraduates). The more women are represented in the student-body population, the more likely they are to receive proportionately fewer athletic opportunities. Anderson et al., *supra*, at 3 (finding that universities with a large share of undergraduates who are female also have a large proportionality gap).

9. Proportionality need not be exact—the policy calls for a ratio of male/female athletes that is “substantially” proportionate to the male/female ratio of undergraduate enrollment. Dep’t of Health, Educ. and Welfare, Office for Civil Rights, A Policy Interpretation: Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71,413, 71,418 (Dec. 11, 1979) [hereinafter 1979 Policy Interpretation]. “Substantially” is never quantitatively defined, but no school that has athletic participation rates within five percentage points of the undergraduate enrollment has been found to violate Title IX. Sigelman & Wahlbeck, *supra* note 8, at 525.

10. 1979 Policy Interpretation, *supra* note 9, at 71,418. The Office for Civil Rights became a division of the Department of Education when the Department became effective in 1980. Department of Education Organization Act, Pub. L. No. 96-88, 93 Stat. 668 (1979).

11. Donald E. Shelton, *Equally Bad Is Not Good: Allowing Title IX “Compliance” by the Elimination of Men’s Collegiate Sports*, 34 U. MICH. J.L. REFORM 253, 261 (2001) (arguing that if financial constraints truly motivated universities’ decisions to eliminate teams, they would start with expensive teams, like football, given that, except for the top forty or fifty Division I schools, most lose large sums of money on football).

12. A General Accounting Office study found that 28% of the 948 four-year colleges that added one or more women’s teams between 1981 and 2001 also reduced the number of men’s opportunities. U.S. GEN. ACCOUNTING OFFICE, GAO-01-297, INTERCOLLEGIATE ATHLETICS: FOUR-YEAR COLLEGES’ EXPERIENCES ADDING AND DISCONTINUING TEAMS 14–15 (Mar. 2001) [hereinafter GAO STUDY], available at <http://www.gao.gov/new.items/d01297.pdf>; see also Elisa Hatlevig, *Title IX Compliance: Looking Past the Proportionality Prong*, 12 SPORTS LAW. J. 87, 97 (2005). Compared head-to-head, however, the number of eliminated men’s teams—386—nearly doubled the number of eliminated women’s teams. GAO STUDY, *supra*, at 14.

13. One hundred seventy-one wrestling teams, comprising 2,648 individual opportunities for collegiate wrestlers, were eliminated between 1981 and 2001. GAO STUDY, *supra* note 12, at 11, 13. As a result of these losses, wrestlers and their allies have brought many (unsuccessful) challenges to Title IX and proportionality compliance. See, e.g., Nat’l Wrestling Coaches Ass’n v. Dep’t of Educ., 366 F.3d 930, 935, 949 (D.C. Cir. 2004); Chalenor v. Univ. of N.D., 291 F.3d 1042, 1046 (8th Cir. 2002) (unsuccessfully challenging a university’s decision to eliminate

This double bind causes many colleges and universities to strive for compliance with the second or third compliance prongs instead of proportionality. Under the second prong, a university can satisfy its Title IX compliance obligations—notwithstanding a disproportionate distribution of athletic opportunities—by showing a history and continuing practice of expanding athletic opportunities for women.<sup>14</sup> Because it is impossible to show a continuing practice of expanding women's opportunities without eventually reaching a distribution of opportunities that complies with prong one, prong two is, by its terms, an interim measure of compliance.<sup>15</sup>

Prong three allows a university to justify its disparate distribution of athletic opportunities by demonstrating that it fully and effectively accommodates its female students' interests and abilities in athletics.<sup>16</sup> But determining the extent to which women are interested in athletics is a complex problem. Social structures, including signals from universities that devalue women's sports as compared to men's, have influenced women's interests in athletics and are responsible, to some degree, for lack of athletic interest among women. As long as these social structures continue to relate to athletics in a gender-specific manner, it is impossible to isolate the extent to which women's interest in athletics is socially constructed. Under a theory of equality that accounts for the effect of these social structures (which I herein call "structuralist equality"), taking into account women's lack of interest in athletics relative to their male peers is ineffective and circular.

OCR and the federal courts have, to some extent, recognized that social structures, including colleges and universities, have constructed women's interests in sports and have been reluctant to make prong three an easy or

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wrestling in pursuit of proportionality compliance); *Miami Univ. Wrestling Club v. Miami Univ.*, 302 F.3d 608, 609–10 (6th Cir. 2002) (same); *Gonyo v. Drake Univ.*, 879 F. Supp. 1000, 1002–03 (S.D. Iowa 1995) (same).

14. 1979 Policy Interpretation, *supra* note 9, at 71,414.

15. "[I]n light of the thirty years since Title IX's passage, it is difficult for any college to boast a history and continuing practice of program expansion for women if the school still does not provide proportionally equal opportunities for both sexes." Kimberly A. Yuracko, *One for You and One for Me: Is Title IX's Sex-Based Proportionality Requirement for College Varsity Athletic Positions Defensible?*, 97 NW. U. L. REV. 731, 741 (2003); *see also* *Roberts v. Colo. State Bd. of Agric.*, 998 F.2d 824, 830 (10th Cir. 1993) (insisting that a school demonstrate both a history and genuinely *continuing* practice to satisfy prong two, while also recognizing that "in times of economic hardship, few schools will be able to . . . continu[e] to expand their women's athletic programs").

Prong-two compliance, while appropriately considered an interim manner of compliance, should not be confused with interim proportionality. While proportionality can be achieved by increasing opportunities for women and/or reducing opportunities for men, OCR has explained that only program expansion for women satisfies prong two. OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF EDUC., CLARIFICATION OF INTERCOLLEGIATE ATHLETICS POLICY GUIDANCE: THE THREE-PART TEST (Jan. 16, 1996) [hereinafter 1996 CLARIFICATION], *available at* <http://www.ed.gov/about/offices/list/ocr/docs/clarific.html>.

16. 1979 Policy Interpretation, *supra* note 9, at 71,414.

attractive compliance option.<sup>17</sup> OCR and the courts include qualitative and subjective factors, such as athletic interest in women's sports generated outside the university, as relevant to the question of whether a university fully and effectively accommodates women's interests in athletics. This multifaceted approach ratchets up the compliance bar under prong three. It also ensures that proportionality under prong one remains the only permanent compliance option subject to a qualitative formula that measures predictable factors within the institution's control. As a result, institutions seeking a truly "safe harbor"<sup>18</sup> from liability unhappily view proportionality compliance as their only real, long-term option for complying with Title IX.<sup>19</sup> However, when the regulated institutions complained that they were being compelled toward prong-one proportionality compliance, OCR espoused that the test was flexible and that the prongs were equally favored.<sup>20</sup> Confusion ensued.<sup>21</sup>

In 2005, OCR clarified prong three by allowing universities to administer surveys to their enrolled female students and rely on the results to demonstrate that women's interests—and as a result, prong three—are satisfied.<sup>22</sup> While a university is obligated to expand its offerings to accommodate unmet interest that the survey reveals, the survey's methodology can make that outcome unlikely.<sup>23</sup> As a result, prong three compliance will not only be easier to attain, but from a university counsel's perspective, it will be a strong, reliable bulwark against enforcement actions

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17. Prong three makes it "difficult for a college to defend its lack of proportional opportunities by arguing that it has fully accommodated women's interests and abilities." Yuracko, *supra* note 15, at 741; *see also infra* Part III.B (explaining how the courts have rejected watered-down interpretations of prong-three compliance).

18. OCR itself used this phrase in describing the proportionality prong. 1996 CLARIFICATION, *supra* note 15, at 1.

19. *See* Pederson v. La. State Univ., 213 F.3d 858, 878 (5th Cir. 2000) (rejecting a lower court's suggestion that proportionality was not determinative of Title IX compliance in the context of athletic participation); Sigelman & Wahlbeck, *supra* note 8, at 521 ("Realistically, then, the compliance issue boils down to whether a school can pass the proportionality test."); Yuracko, *supra* note 15, at 741 (explaining why compliance "most often comes down to the proportionality requirement"); COMMISSION REPORT, *supra* note 6, at 23–24; *cf.* Jeffrey H. Orleans, *An End to the Odyssey: Equal Athletic Opportunities for Women*, 3 DUKE J. GENDER L. & POL'Y 131, 144 (1996) (suggesting OCR intended prongs two and three to be transitional "bridges" rather than permanent compliance measures).

20. OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF EDUC., FURTHER CLARIFICATION OF INTERCOLLEGIATE ATHLETICS POLICY GUIDANCE REGARDING TITLE IX COMPLIANCE [sic] (July 11, 2003) [hereinafter 2003 CLARIFICATION], available at <http://www.ed.gov/about/offices/list/ocr/title9guidancefinal.html>; OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF EDUC., ADDITIONAL CLARIFICATION OF INTERCOLLEGIATE ATHLETICS POLICY: THREE-PART TEST—PART THREE 1 (Mar. 17, 2005) [hereinafter 2005 CLARIFICATION], available at <http://www.ed.gov/about/offices/list/ocr/docs/title9guidanceadditional.pdf>.

21. COMMISSION REPORT, *supra* note 6, at 25–26.

22. 2005 CLARIFICATION, *supra* note 20, at 5; *see also infra* Part II.B.

23. *See infra* Part II.B.

and lawsuits. In other words, interest-defined compliance will be a truly “equally favored” prong.

However, while the 2005 Clarification restores genuine flexibility to the three-prong test, it does so in disregard for, and at the expense of, the structuralist-equality concerns that courts have recognized. Without the more volatile, uncertain brand of immunity that the pre-2005 prong three offered, universities now have no regulatory incentive to strive for a more proportionate distribution of athletic opportunities. Instead, through their disparate offerings, they will continue to position women’s athletics at the margins and contribute to society’s perception of athletics as primarily masculine activities. This “antinormalization” of women’s participation helps to negatively construct women’s interests in sports.

Part I of this Article provides background on Title IX and its regulatory regime.<sup>24</sup> Part II describes and critiques the Model Survey<sup>25</sup> that institutions may now use under the 2005 Clarification.<sup>26</sup> Part III argues that the interest-survey policy is inherently inconsistent with the structuralist equality goals of Title IX. That Part describes how various social structures, including educational institutions and Title IX itself, have constructed women’s interests in athletics by antinormalizing their athletic participation;<sup>27</sup> how the federal appellate courts and the three-prong policy itself espouse a version of Title IX rooted in structuralist equality;<sup>28</sup> and how the newly clarified version of the three-prong policy undermines this structuralist equality.<sup>29</sup>

Part IV argues that repealing the 2005 Clarification and restoring the agency’s former interpretation of the three-prong policy will not resolve the inherent tension between the three-prong policy and OCR’s express desire to give universities a flexible test with more than one compliance endpoint.<sup>30</sup> To resolve this tension, OCR has two choices. It could abandon the “flexibility” rhetoric and acknowledge that, to be consistent with the structuralist equality reflected in Title IX, prong three, like prong two, is only justified as an interim compliance measure. Or it could offer an alternative to proportionality compliance that is defined by an objective measure other than interest. This Article suggests that proportionate funding (as opposed to proportionate number of opportunities) would be an appropriate alternative “fourth prong” because it would require the

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24. See *infra* Part I.

25. See *infra* Part II.A.

26. See *infra* Part II.B.

27. See *infra* Part III.A.

28. See *infra* Part III.B.

29. See *infra* Part III.C.

30. See *infra* Part IV.



university to signal equal valuation of women's sports, mitigating the social forces that have antinormalized women's participation in sports.

## I. TITLE IX AND REGULATORY BACKGROUND

To place OCR's new Model Survey approach to Title IX compliance in context, this Part first provides background on Title IX, its implementing regulations, and the various policy interpretations and clarifications that OCR has released over the years. Title IX of the Education Amendments of 1972<sup>31</sup> prohibits sex discrimination by any educational institution receiving federal support,<sup>32</sup> a broad class of institutions that includes the vast majority of accredited colleges and universities, as well as secondary and elementary schools. Though Title IX is perhaps best known for prohibiting sex discrimination in athletics,<sup>33</sup> the original statute does not expressly address that context. In fact, Congress enacted Title IX in response to extensive findings of discrimination against women in the classroom.<sup>34</sup> It apparently paid little attention to Title IX's application to athletics.<sup>35</sup>

However, as the OCR<sup>36</sup> began its task of promulgating Title IX's implementing regulations, the issue of athletics quickly became the center of public and regulatory debate. In response, Congress amended Title IX, directing OCR to make "reasonable [regulatory] provisions considering the nature of particular sports" in intercollegiate athletics.<sup>37</sup> The implementing regulations promulgated pursuant to this mandate, along with OCR's periodic policy interpretations, define what it means for an educational institution's athletic program to discriminate "on the basis of sex."

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31. 20 U.S.C. §§ 1681–1688 (2000).

32. *Id.* § 1681(a) ("No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving federal financial assistance."). Nearly all colleges and universities, and most high schools and middle schools, receive some federal funds. B. Glenn George, *Fifty/Fifty: Ending Sex Segregation in School Sports*, 63 OHIO ST. L.J. 1107, 1107 (2002).

33. JODY FEDER, CONG. RESEARCH SERV., TITLE IX, SEX DISCRIMINATION AND INTERCOLLEGIATE ATHLETICS: A LEGAL OVERVIEW 2 (2004).

34. *Cohen v. Brown Univ.*, 101 F.3d 155, 165 (1st Cir. 1996) (citing 118 CONG. REC. 5804 (1972) (statement of Sen. Bayh)).

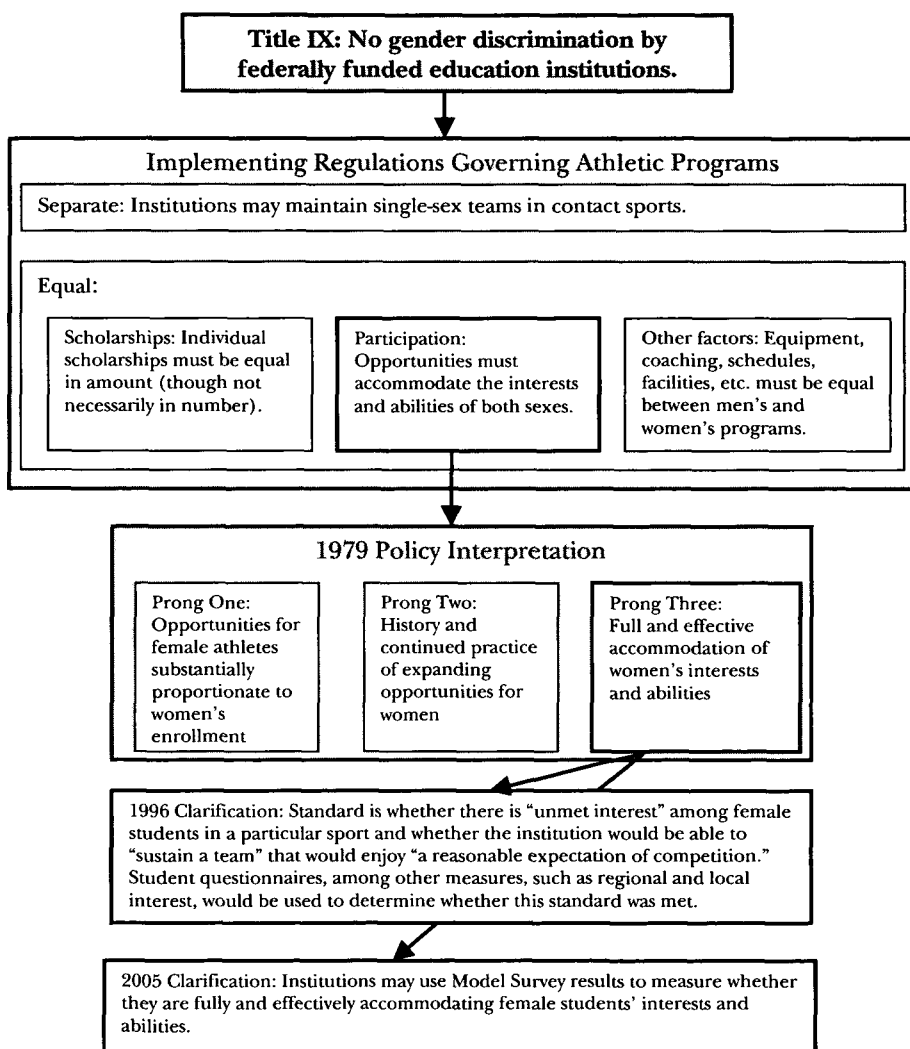
35. SARAH K. FIELDS, FEMALE GLADIATORS: GENDER, LAW, AND CONTACT SPORT IN AMERICA 11 (2005) (noting that the only discussion of Title IX and sports was a comment by Title IX's co-sponsor, Senator Birch Bayh, who said that the law would not mandate desegregation of football teams and men's locker rooms).

36. OCR was a division of what was then the Department of Health, Education, and Welfare. OCR is now located in the Department of Education.

37. The so-called "Javits Amendment," named after its sponsor, Jacob K. Javits of New York, authorized OCR to regulate college athletics. Gender and Athletics Act, Pub. L. No. 93-380, § 844, 88 Stat. 484, 612 (1974). Congress passed the Javits Amendment after rejecting an amendment proposed by Senator John Tower of Texas that would have exempted revenue-producing sports, such as men's football and men's basketball. See FIELDS, *supra* note 35, at 11; George, *supra* note 32, at 1113–14.

This Part will first examine the implementing regulations that OCR has promulgated to govern athletic programs pursuant to Title IX. Second, it will analyze the sources of the three-prong test: OCR's 1979 Policy Interpretation of the implementing regulations' equal-opportunity-in-participation requirement and subsequent policy statements clarifying the three-prong test. (The relationship between the statute, the regulation, and the various policy statements is illustrated in Figure 1 below.) Finally, it will address the Commission on Opportunity in Athletics, whose 2003 findings illustrate and contextualize the political debate about the three-prong policy and whose recommendations included the interest-survey concept that OCR adopted in the 2005 Clarification.

*FIGURE 1: TITLE IX STATUTES, REGULATIONS, AND POLICIES*



### A. THE IMPLEMENTING REGULATIONS

The implementing regulations to Title IX, promulgated in 1975 and substantively unchanged since then, contain several provisions governing intercollegiate, interscholastic, club, and intramural athletics sponsored by federally funded institutions.<sup>38</sup> These regulations convey two themes—separate and equal. Schools may retain sex-segregated teams, at least in contact sports.<sup>39</sup> Nevertheless, to ensure these separate programs are still equal,<sup>40</sup> the regulations require that institutions provide “equal athletic opportunity for both sexes.”<sup>41</sup>

There are three components of the implementing regulations that seek to ensure that separate athletic programs for men and women are, in some respects, equal.<sup>42</sup> First, the most important factor in deciding whether an institution satisfies the equal opportunity requirement is whether opportunities for participation “effectively accommodate the interests and abilities of both sexes.”<sup>43</sup> This requirement of equality in participation is the “heartland”<sup>44</sup> of the equal-opportunity requirement because it seeks to ensure a nondiscriminatory distribution of athletic opportunities. As explained in the next section, the three-prong test interprets this regulatory provision. Second, the regulations provide that OCR will consider other factors, such as equitable distribution of equipment, access to facilities, compensation of coaches, and publicity, to ensure that the quality of the women’s program is comparable to the quality of the men’s program.<sup>45</sup>

38. 34 C.F.R. § 106.41 (2005).

39. *Id.* The “Separate Teams” regulation provides that “a recipient may operate or sponsor separate teams for members of each sex where selection of such teams is based upon competitive skill or the activity involved is a contact sport.” *Id.* In the absence of a women’s team in a particular sport, the institution must let a woman try out for the men’s team, as long as the sport in which she is seeking to participate is a non-contact sport. *Id.* Contact sports are “boxing, wrestling, rugby, ice hockey, football, basketball and other sports the purpose or major activity of which involves bodily contact.” *Id.*

40. See *FIELDS*, *supra* note 35, at 11 (reporting that OCR considered a co-ed team approach but enacted a separate-but-equal framework instead); see also *Kelley v. Bd. of Trs., Univ. of Ill.*, 35 F.3d 265, 271 (7th Cir. 1994) (noting that the regulations do not mandate co-ed teams and instead require that separate teams provide equal opportunities to both sexes).

41. 34 C.F.R. § 106.41(c) (“A recipient which operates or sponsors interscholastic, intercollegiate, club, or intramural athletics shall provide equal athletic opportunity for members of both sexes.”).

42. See generally VALERIE BONNETTE & LAMAR DANIEL, U.S. DEP’T OF EDUC., TITLE IX ATHLETICS INVESTIGATOR’S MANUAL (1990) (separating the compliance factors into three major categories: effective accommodation (measured by the three-prong compliance test), scholarships, and other factors).

43. 34 C.F.R. § 106.41(c)(1).

44. *Cohen v. Brown Univ.* (*Cohen I*), 991 F.2d 888, 897 (1st Cir. 1993).

45. See 34 C.F.R. § 106.41(c)(2)–(10) (listing “[s]cheduling of games and practice time”; “[t]ravel and per diem allowance[s]”; “[o]ppportunity to receive coaching and academic tutoring”; “[p]rovision of locker rooms, practice and competitive facilities”; “[p]rovision of

Third, a separate regulatory provision requires that athletic scholarships be awarded in proportion to the number of students of each sex participating in interscholastic or intercollegiate athletics.<sup>46</sup> One factor that does not enter into OCR's formula for equal opportunity is funding. The implementing regulations expressly state that compliance does not require equal aggregate funding for men's and women's athletic programs.<sup>47</sup>

### B. THE THREE-PRONG COMPLIANCE POLICY

In 1979, OCR published a Policy Interpretation of the regulatory requirement that educational institutions "effectively accommodate the interests and abilities of members of both sexes."<sup>48</sup> The Policy Interpretation sets forth three alternative measures of compliance—known as the three-prong test—to determine whether institutions satisfy the equal-participation requirement. As noted above, these three prongs are (1) a substantial proportionality between the percentage of student athletes who are female to the percentage of students who are female; (2) a history and continuing practice of expanding women's athletic programs; and (3) full and effective accommodation of women's<sup>49</sup> interests and abilities in athletics.<sup>50</sup>

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medical and training facilities and services"; "[p]rovision of housing and dining facilities and services"; and "[p]ublicity"); *see also* 1979 Policy Interpretation, *supra* note 9, at 71,417 (adding recruiting services and other support services).

46. 34 C.F.R. § 106.37(c). For example, if 55% of the student athletes are men, male athletes should receive 55% of the available financial assistance for athletics. BONNETTE & DANIEL, *supra* note 42, at 15.

47. Bonnette and Daniel note:

Unequal aggregate expenditures for members of each sex or unequal expenditures for male and female teams if a recipient operates or sponsors separate teams will not constitute noncompliance with this section, but the Assistant Secretary may consider the failure to provide necessary funds for teams for one sex in assessing equality of opportunity for members of each sex.

BONNETTE & DANIEL, *supra* note 42, at 15. Moreover, "identical benefits, opportunities, or treatment are not required, provided the overall effect of any difference is negligible" or attributable to "unique aspects of particular sports" or "sex neutral factors." 1979 Policy Interpretation, *supra* note 9, at 71,415.

48. 1979 Policy Interpretation, *supra* note 9, at 71,417 (quoting the implementing regulation currently codified at 34 C.F.R. § 106.41(c)(1)).

49. Allowing for the possibility that at some institutions men may have disproportionately fewer athletic opportunities than women, the 1979 Policy Interpretation refers not to women but to the "underrepresented" sex. 1979 Policy Interpretation, *supra* note 9, at 71,418. But OCR acknowledges that "participation in college sports has historically been emphasized for men but not women," which has "contributed to existing differences in the number of sports and scope of competition for men and women"—the number of opportunities for men outweighing opportunities for women. *Id.* at 71,419. Therefore, for simplicity, I will refer to "women" instead of the more cumbersome "underrepresented sex" when describing the elements of the three-prong test.

50. 1979 Policy Interpretation, *supra* note 9.

While OCR has repeatedly emphasized that institutions enjoy flexibility in measuring compliance by any one of three options,<sup>51</sup> institutions have generally found compliance under prongs one and two to be increasingly difficult to attain. Several decades since the Policy Interpretation's inception,<sup>52</sup> the option of complying with prong two by demonstrating both a history and a continuing practice of expanding programs has become difficult, if not impossible.<sup>53</sup> As for prong one, increases in women's overall college enrollment set the compliance bar ever higher.<sup>54</sup> And budget shortfalls that compel universities to eliminate athletic opportunities rather than add them cause many to associate proportionality compliance with cuts to men's sports that do not generate revenue, further decreasing the desirability of prong one.<sup>55</sup>

The third prong thus became the focal point for many institutions' compliance efforts, and as such, has been the subject of OCR's subsequent clarifications. In 1996, OCR explained that it would determine whether an institution complied with the third prong by considering whether there is "unmet interest" among female students in a particular sport and whether the institution would be able to "sustain a team" of female participants that would enjoy "a reasonable expectation of competition."<sup>56</sup> In terms of measuring "unmet interest," OCR would look at indicators such as:

- requests by students and admitted students that a particular sport be added;

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51. 1996 CLARIFICATION, *supra* note 15; 2003 CLARIFICATION, *supra* note 20; 2005 CLARIFICATION, *supra* note 20, at 3.

52. Moreover, for a period of time between 1984 and 1989, after the Supreme Court held that Title IX did not apply to components of education programs, like athletics, that did not directly receive federal funding, and before Congress clarified the statute to negate that interpretation, *see supra* note 3, university athletic departments had no Title IX obligations that would have compelled them to add programs.

53. *See, e.g.,* George, *supra* note 32, at 1118; Yuracko, *supra* note 15, at 741. Moreover, any school that truly did so for thirty years would probably satisfy substantial proportionality compliance. Of the 130 institutions that OCR reviewed between 1992 and 2002, only eight attempted to comply under prong two, in comparison to the eighty-six that attempted to comply under prong three and the thirty-six that satisfied prong one. NAT'L CTR. FOR EDUC. STATISTICS, USER'S GUIDE TO DEVELOPING STUDENT INTEREST SURVEYS UNDER TITLE IX 3 (Mar. 2005) [hereinafter USER'S GUIDE].

54. FEDER, *supra* note 33, at 8 (noting that women's enrollment in post-secondary institutions rose 30% between 1981 and 1999); COMMISSION REPORT, *supra* note 6, at 13 (stating that women's enrollment as college undergraduates—measured at 56% in 1997—exceeds men's enrollment).

55. *See, e.g.,* Martha Burk & Natasha Plumly, *Who Owns Sports? The Politics of Title IX*, 14 MARQ. SPORTS L. J. 49, 51 (2003); *see also* Orleans, *supra* note 19, at 132 (describing the "rift" that develops between male and female student athletes "as each group is told, or comes to believe, that its opportunities must be limited in order to increase those of the other group").

56. 1996 CLARIFICATION, *supra* note 15. The 1996 Clarification also addressed prong-one compliance by declining to require exact proportionality, emphasizing a case- and fact-specific approach over "strict numerical formulas or 'cookie cutter' answers." *Id.*

- requests that an existing club sport be elevated to intercollegiate team status;
- participation in particular club or intramural sports;
- interviews with students, admitted students, coaches, administrators, and others regarding interest in particular sports;
- results of questionnaires of student and admitted students regarding interests in particular sports; . . . participation in particular[] interscholastic sports by admitted students[]; and]
- participation rates in sports in high schools, amateur athletic associations, and community sports leagues that operate in areas from which the institution draws its students . . .<sup>57</sup>

Nonetheless, dissatisfaction with prong three persisted, along with rhetoric of confusion about what Title IX compliance entails.<sup>58</sup> Because OCR's multifactor approach measured compliance under prong three based on qualitative, subjective factors, institutions claimed to be uncertain of whether their athletic programs satisfied OCR's test, or more importantly, whether they could be successfully defended in court.<sup>59</sup>

Also, several federal appellate courts consider the elimination of an existing, viable women's team to be *de facto* evidence of "unmet interest" and noncompliance with prong three.<sup>60</sup> For example, in *Cohen v. Brown University*,<sup>61</sup> the First Circuit rejected a university's attempt to eliminate two men's and two women's teams at the same time.<sup>62</sup> This seemingly even-

57. *Id.* Factors are similar to OCR's internal manual for investigators. See BONNETTE & DANIEL, *supra* note 42, at 24–27. In addition, the 1979 Policy Interpretation, *supra* note 9, afforded flexibility to institutions, allowing them to gauge interest level by any method of their choosing, provided:

- (a) The processes take into account the nationally increasing levels of women's interests and abilities;
- (b) The methods of determining interest and ability do not disadvantage the members of an underrepresented sex;
- (c) The methods of determining ability take into account team performance records; and
- (d) The methods are responsive to the expressed interests of students capable of intercollegiate competition who are members of an underrepresented sex.

58. COMMISSION REPORT, *supra* note 6, at 25–26.

59. *Id.* at 23–24.

60. *Kelley v. Bd. of Trs., Univ. of Ill.*, 35 F.3d 256, 269–70 (7th Cir. 1994) (explaining that the University of Illinois could not eliminate the women's swim team without violating prong three, because "women with a demonstrated interest in an intercollegiate athletic activity and demonstrated ability to compete at the intercollegiate level would be left without an opportunity to participate in their sport"); *Roberts v. Colo. State Bd. of Agric.*, 998 F.2d 824, 832 (10th Cir. 1993); *Cohen v. Brown Univ.*, 991 F.2d 888, 904 (1st Cir. 1993).

61. *Cohen I*, 991 F.2d at 906.

62. *Id.*

handed attempt to reduce athletic expenditures rendered Brown noncompliant with prong three. The court recognized that a school cannot cancel a “healthy” women’s team and still claim to “fully and effectively accommodate” women’s interests and abilities in athletics.<sup>63</sup> Since *Cohen*, prong three ensures that at institutions failing the proportionality test under prong one, existing women’s sports teams are protected from elimination in a way that men’s sports teams are not.<sup>64</sup> This interpretation fueled criticism that the three-prong test, rather than universities’ disparate distribution of athletic opportunities or the financial constraints forcing them to cut teams, was responsible for cuts in men’s sports.<sup>65</sup>

### C. THE COMMISSION ON OPPORTUNITY IN ATHLETICS

In response to this controversy, the Department of Education decided in 2002 to charge a commission to study Title IX’s athletics regulations and policy with an eye toward reform. The Commission heard both expert and lay testimony at open town hall meetings in several cities across the United States.<sup>66</sup> It also received comments by letter, telephone, and e-mail.<sup>67</sup> The Commission released its report with recommendations and findings in February 2003.<sup>68</sup> The Commission’s work was significant for two reasons. First, it provided a formal, quasi-regulatory forum for debates over many controversial aspects of Title IX’s application to college and university athletics. Second, its recommendations regarding interest surveys ultimately resulted in OCR’s adoption of that methodology for measuring compliance with prong three in 2005.

The Commission heard arguments that Title IX is an affirmative action quota that caps or eliminates opportunities for men.<sup>69</sup> These arguments ranged from the emotional and sentimental—cries of “Let our sons play[!]”<sup>70</sup>—to the statistical—reports of numbers and percentages of women’s overall gains and men’s overall losses in athletic opportunity in the age of Title IX.<sup>71</sup> Many critics blamed the elimination of men’s teams, such

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63. *Id.*

64. *Id.*

65. COMMISSION REPORT, *supra* note 6, at 24.

66. *Id.* at 4.

67. *Id.*

68. *Id.* at 1.

69. *Id.* at 24.

70. COMMISSION REPORT, *supra* note 6, at 8.

71. *Id.* at 19 (showing that men’s teams were discontinued more often than women’s in the 1990s). However, more recent data suggest that the trend of losses in men’s sports is changing direction. Welch Suggs, *Gender Quotas? Not in College Sports*, CHRON. HIGHER EDUC., July 1, 2005, at A24 [hereinafter Suggs, *Gender Quotas*] (reporting that the Department of Education’s most recent data show the total number of male athletes increasing “by about 2,700 between 2002–3 and 2003–4, and the number of men’s teams either increased or remained steady across all divisions”).

as wrestling, track and field, swimming and diving, and baseball, on institutions' efforts to attain proportionality and avail themselves of the "safe harbor" from lawsuits.<sup>72</sup> In its report, the Commission acknowledged that the burdensome proportionality test under prong one has been a factor in universities' decisions to cut or cap teams.<sup>73</sup> While noting that "[f]acility limitations and budgetary concerns" also influence these decisions, the Commission recognized that institutions "cannot ignore the potential effect of their decision on Title IX compliance" and apparently fear "litigation if [they] cut[] a women's team without being in compliance with the proportionality test."<sup>74</sup>

The Commission's published report includes twenty-three recommendations, fifteen of which received the Commissioners' unanimous approval.<sup>75</sup> These unanimously approved recommendations were "rather benign in nature and merely call[ed] for clarity and consistency in Title IX enforcement by OCR."<sup>76</sup> For instance, the Commission recommended that OCR "make clear that cutting teams in order to demonstrate compliance with Title IX is a disfavored practice."<sup>77</sup>

In contrast, other recommendations garnered dissent among the commissioners and compelled two to refuse to sign on to the report.<sup>78</sup> Some of these recommendations modified prong one so as to reduce the difference between universities' existing offerings and a proportional distribution of athletic opportunities for women. For example, the Commission recommended that institutions be allowed to exclude "nontraditional"<sup>79</sup> students from the general student population.<sup>80</sup> This recommendation was controversial because women are "disproportionately likely to be the 'non-traditional' older students excluded under this proposal."<sup>81</sup> Thus, excluding them from the student population reduces the percentage of female students counted for compliance purposes and, in

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72. COMMISSION REPORT, *supra* note 6, at 23.

73. *Id.* at 24.

74. *Id.* at 24–25.

75. *Id.* at 59–60.

76. Lisa Yonka Stevens, Note, *The Sport of Numbers: Manipulating Title IX to Rationalize Discrimination Against Women*, 2004 BYU EDUC. & L.J. 155, 170; see also COMMISSION REPORT, *supra* note 6, at 33–40 (setting forth the recommendations).

77. COMMISSION REPORT, *supra* note 6, at 34 (recommendation five).

78. These Commissioners published their minority views in a separate report. See generally JULIE FOU DY & DONNA DE VARONA, MINORITY VIEWS ON THE REPORT OF THE COMMISSION ON OPPORTUNITY IN ATHLETICS (Feb. 26, 2003) [hereinafter MINORITY REPORT], available at <http://womenssportsfoundation.org/cgi-bin/iowa/issues/rights/articles.html?record=944>.

79. Nontraditional students are those "not between the ages of 18 and 24 and students of any age who have children." MINORITY REPORT, *supra* note 78, at 14.

80. COMMISSION REPORT, *supra* note 6, at 39 (recommendation twenty).

81. MINORITY REPORT, *supra* note 78, at 14.



turn, the percentage of female student athletes a university must have to attain proportionality under prong one.

Another controversial recommendation would let institutions count unfilled roster spots as actual student athletes, raising concerns that universities could attain proportionality under prong one on the backs of potential rather than actual female athletes.<sup>82</sup> These recommendations and others appeared to the dissenting commissioners to weaken Title IX's protection against discrimination by undermining proportionality compliance.<sup>83</sup>

The Commission also recommended that OCR consider allowing institutions to rely on the results of surveys gauging whether an institution's athletic offerings satisfy its female students' interests and abilities.<sup>84</sup> Redefining compliance under prong three as a proportion between the ratio of male and female athletes to the ratio of male and female students who express an interest in athletics would provide institutions with a "quantifiable way of demonstrating compliance."<sup>85</sup> A minority of commissioners feared that this manner of compliance would "prevent future progress in providing opportunities for women" because it failed to acknowledge either the causal effect that opportunity has on interest levels or the historical patterns of discrimination against women's interest in athletics.<sup>86</sup> In a separate, independent report, the two dissenting commissioners argued:

Using interest surveys is a way to force girls and women to *prove* their right to equal opportunity before giving them a chance to play. The proposal rests on the stereotyped notion that women are inherently less interested in sports than men—a notion that contradicts Title IX and fundamental principles of civil rights law.<sup>87</sup>

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82. COMMISSION REPORT, *supra* note 6, at 37 (recommendation fifteen). The objection here is obvious: Schools could comply with Title IX without having to ensure that actual women fill their theoretical participation rates. MINORITY REPORT, *supra* note 78, at 13. Moreover, the minority Commissioners found it particularly troubling for a school that spends 112% more recruiting men than women—and that then, as a result, has fewer women participating on its women's teams—to be able to claim credit for providing a "predetermined" hypothetical number of opportunities regardless of whether those opportunities are filled by actual student athletes. *Id.*

83. MINORITY REPORT, *supra* note 78, at 1.

84. COMMISSION REPORT, *supra* note 6, at 38–39 (recommendations eighteen and nineteen).

85. *Id.* at 38.

86. *Id.*

87. MINORITY REPORT, *supra* note 78, at 16.

## II. THE MODEL SURVEY AND ITS CONTROVERSIAL METHODOLOGY

At first, the Department of Education refrained from adopting any of the Commission's recommendations.<sup>88</sup> In 2005, however,<sup>89</sup> OCR announced a new clarification of the three-prong compliance policy. Consistent with the Commission's recommendation, the newly clarified policy allows institutions to demonstrate compliance with the third prong by relying on the results of a survey of enrolled students' interests and abilities in athletics.<sup>90</sup> The 2005 Clarification provides detailed instructions for assessing students' interest using a Web-based "Model Survey" developed by the National Center for Education Statistics.<sup>91</sup> An institution that administers the survey according to OCR's instructions enjoys the presumption of prong-three compliance when survey results indicate lack of interest sufficient to sustain additional female varsity teams.<sup>92</sup> To be clear, OCR does not require institutions to administer the Model Survey or any survey to demonstrate compliance with the third prong. Further, no institution is required to use the third prong at all. However, it is reasonable to expect, given the unpopularity of prong-one proportionality compliance, that institutions will select prong three, the

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88. After the Commission Report's release, women's sports advocates held their collective breath expecting the Department of Education to adopt many of the controversial recommendations. But they exhaled a sigh of relief when, five months later, OCR issued a "clarification letter" that merely reiterated the alternative nature of the three prongs, reminded institutions that nothing in Title IX requires them to eliminate men's teams, and pledged to "aggressively enforce Title IX standards." 2003 CLARIFICATION, *supra* note 20, at 2-3; *see also* Stevens, *supra* note 76, at 156 (pointing out that the Department of Education could adopt any of these recommendations at any time in the future).

89. *See* Christine Brennan, *E-Mail Surveys May Be First Step in Effort to Cripple Progress of Title IX*, USA TODAY, Mar. 24, 2005, at 8C (suggesting that the Department of Education deliberately waited out the intervening election before announcing this unpopular change).

90. 2005 CLARIFICATION, *supra* note 20, at iv. Recall OCR's 1996 Clarification of the third prong:

An institution is in compliance with the third prong so long as there is no *sport* for which, with respect to the underrepresented sex, there is unmet interest and ability to sustain an intercollegiate team that would have a reasonable expectation of competition. If there is a sport for which those conditions are met, the institution must either provide that sport or show that it is meeting the interests and abilities of the underrepresented sex.

1996 CLARIFICATION, *supra* note 15.

91. NCES developed a *User's Guide to Developing Student Interest Surveys Under Title IX*, *supra* note 53, which was released with the Policy Clarification, along with a *Technical Manual for Developing the User's Guide* that was generated by the National Institution of Statistical Sciences. *See generally* NAT'L INST. OF STATISTICAL SCIENCES, TECHNICAL MANUAL FOR DEVELOPING THE USER'S GUIDE (2005) [hereinafter TECHNICAL MANUAL].

92. 2005 CLARIFICATION, *supra* note 20, at 7. The presumption can be overcome "if OCR finds direct and very persuasive evidence of unmet interest sufficient to sustain a varsity team such as the recent elimination of a viable varsity team" or a recent petition to elevate a club sport to varsity status. *Id.* Institutions may not use the failure to express interest during a survey as grounds to eliminate a current and viable intercollegiate team. *Id.*

compliance option that requires less expense and effort. As this Part demonstrates, the Model Survey's design virtually guarantees that the responses of interest and ability will not be sufficient to compel a university to add teams for women.

This Part will first demonstrate how a student may be invited to participate in a Model Survey. It will then provide a critique of the Model Survey, listing the various reasons why the Model Survey is an inadequate method of complying with the requirements of Title IX.

#### A. A STUDENT TAKES THE MODEL SURVEY

A hypothetical university student might be invited to participate in the Model Survey by an e-mail<sup>93</sup> that reads something like this:<sup>94</sup>

*To: Student@university.edu  
From: University Administration  
Date: September 1, 2006  
Subject: Athletic interest survey*

*Dear Student,*

*In an effort to determine whether our current offerings of intercollegiate, club, and intramural athletics meet the athletic interests and abilities of our students, we are asking all female<sup>95</sup> students to participate in a ten-minute, confidential survey.*

*First, the survey will ask for your demographic information, such as age, gender, year in school, and whether you are a full- or part-time student. You will then be asked to provide information about your athletic experience, current participation in athletic activities, and interest in future participation in athletic activities.*

*If you do not respond to the survey, we will infer that you are not interested in participating in athletic activities.<sup>96</sup>*

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93. OCR expressly suggests e-mails linking to the Model Survey Web site as an appropriate method of inviting students' participation. 2005 CLARIFICATION, *supra* note 20, at 7.

94. OCR does not mandate e-mail text that educational institutions must use to distribute Web links to the survey. I have based the text of this hypothetical e-mail largely on the text contained in the first screen of the Model Survey, *see* TECHNICAL MANUAL, *supra* note 91, at 7; 2005 CLARIFICATION, *supra* note 20, at 6.

95. An institution could instead choose to survey every full-time undergraduate rather than just the women, and OCR notes that "ideally [the survey] will be administered to members of both sexes." 2005 CLARIFICATION, *supra* note 20, at 6. Under either approach, sampling is not permitted. *Id.*

96. OCR expressly provides that institutions may assume that a nonresponse indicates an actual lack of interest, as long as all students have been given an easy opportunity to respond, and the purpose of the survey (and the consequence of a nonresponse) has been made clear. *Id.*

*Please click on the Web link below to begin the survey.*

*Thank you for your cooperation,  
The Administration*

A student who links to the survey Web page will click her way through a couple of preliminary screens—including one giving her the option to bypass the rest of the survey altogether by giving a blanket “not interested in athletics” response—and then arrive at a list of sports. The list contains all NCAA-recognized varsity sports,<sup>97</sup> including designated “emerging sports.”<sup>98</sup> From this list of thirty, the student is invited to check as many as she wants to provide information about her past, present, and intended future participation. The next screen brings up a grid: one row for each of the sports she selected on the previous screen and one column for each of the following four questions:

1. At what level did you participate in this sport in high school: Recreational, Intramural, Club, Junior Varsity, or Varsity?
2. At what level are you participating in this sport at this university: Recreational, Intramural, Club, or Intercollegiate?
3. At what level do you wish to participate in this sport at this university: Recreational, Intramural, Club, or Intercollegiate?
4. Do you believe that you have the ability to participate at the level in which you indicated interest: Yes, I have the ability, or No, I would have to develop the ability?<sup>99</sup>

After the student answers each of these four questions for as many sports as she selected, the Web site displays a page that allows her to provide additional comments or feedback. It also informs her that she may use the survey form to request that the university’s athletic department contact her about her reported interest in athletics.

### *B. CRITIQUE OF THE MODEL SURVEY*

OCR’s decision to allow Model Survey results to create a presumption of compliance with prong three has been publicly criticized by the NCAA,<sup>100</sup>

97. If the surveying institution is not a member of the NCAA, the list would include the varsity sports recognized by the national intercollegiate athletic association to which the school belongs—either the National Association of Intercollegiate Athletics or the National Junior College Athletic Association. *Id.* at 7 n.13.

98. NCAA lists the following emerging sports for women: archery, badminton, bowling, equestrian, rugby, squash, synchronized swimming, and team handball. NCAA, Emerging Sports for Women, available at [http://www1.ncaa.org/membership/membership\\_svcs/emerging\\_sports/home.html](http://www1.ncaa.org/membership/membership_svcs/emerging_sports/home.html) (last visited Feb. 24, 2006).

99. TECHNICAL MANUAL, *supra* note 91, at 62.

100. Press Release, NCAA, NCAA Leadership Groups Urge Department of Education to Rescind Additional Clarification for Title IX and Maintain 1996 Clarification (Apr. 28, 2005), available at [http://www2.ncaa.org/media\\_and\\_events/press\\_room/2005/april/20050428\\_](http://www2.ncaa.org/media_and_events/press_room/2005/april/20050428_)

newspaper editorials,<sup>101</sup> advocacy groups,<sup>102</sup> more than 140 members of Congress,<sup>103</sup> and even a Hollywood actor.<sup>104</sup> Opponents maintain that the survey's flawed methodology virtually guarantees that a school relying on the results will rarely have to increase women's sports opportunities.<sup>105</sup> Critics have also objected to OCR's failure to seek public comment on the Model Survey and have argued that the 2005 Clarification is inconsistent with federal court decisions rejecting survey evidence to demonstrate compliance with Title IX.<sup>106</sup>

As explained in more detail below, the Model Survey's major problems are as follows. First, the time and manner of survey distribution may give rise to reasons other than lack of interest that a student would fail to respond, yet the 2005 Clarification allows institutions to count each passive nonresponse as a conscious vote of no interest. Second, the Model Survey's target population of currently enrolled students is problematic because it ignores the highly relevant population of interested and capable female student athletes who would have enrolled, or whom the school would have been able to recruit, had the school offered the sport of their choice. Third, the Model Survey gives controlling weight to respondents' self-assessment of their own athletic ability and provides response options that are slanted in a way that is likely to underreport ability.

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titleix\_resolution.html (announcing an NCAA Executive Commission resolution urging OCR to rescind the policy and urging NCAA member institutions to decline the use of interest surveys).

101. See, e.g., Editorial, *A New Attack on Women's Sports*, N.Y. TIMES, Apr. 12, 2005, at A20; Editorial, *Too Lax on Title IX*, WASH. POST, Apr. 2, 2005, at A20.

102. See Letter from Lisa M. Maatz & Jocelyn Samuels, Nat'l Coal. for Women and Girls in Educ., to Margaret Spellings, U.S. Secretary of Educ. (Mar. 28, 2005), available at <http://www.ncwge.org/documents/NCWGE.spellings.ltr.final/pdf>; DON SABO & CHRISTINE H.B. GRANT, CTR. FOR RES. ON PHYSICAL ACTIVITY, SPORT & HEALTH, LIMITATIONS OF THE DEPARTMENT OF EDUCATION'S ONLINE SURVEY METHOD FOR MEASURING ATHLETIC INTEREST AND ABILITY ON U.S.A. CAMPUSES (June 2005), available at [www.dyc.edu/crpash/limits\\_of\\_online\\_survey.pdf](http://www.dyc.edu/crpash/limits_of_online_survey.pdf); WOMEN'S SPORTS FOUND., DEPARTMENT OF EDUCATION CREATES HUGE TITLE IX COMPLIANCE LOOPHOLE: THE FOUNDATION POSITION (June 16, 2005) [hereinafter WOMEN'S SPORTS FOUND., COMPLIANCE LOOPHOLE], available at <http://www.womenssportsfoundation.org/cgi-bin/iowa/issues/rights/article.html?record=1009>. See generally Save Title IX, <http://www.SaveTitleIX.org> (last visited March 10, 2006).

103. See Press Release, Congresswoman Nancy Pelosi, Pelosi Recognizes the 33rd Anniversary of Title IX and the Opportunities Provided to Young Girls (June 22, 2005), available at <http://www.house.gov/pelosi/press/releases/June05/TitleIX.html> (including the text of a letter sent from House Democratic Leader Nancy Pelosi and more than 140 other House Democrats to President George W. Bush).

104. "I am here to take you on a short ride in Thelma and Louise's car if you think it's fair and just to limit a girl's opportunity to play sports based on her response to an interest survey." COMMISSION REPORT, *supra* note 6, at 8 (quoting Geena Davis, "actress and amateur archer").

105. See, e.g., WOMEN'S SPORTS FOUND., COMPLIANCE LOOPHOLE, *supra* note 102 (calling the Model Survey a compliance "loophole").

106. *Id.*

Fourth, under the 2005 Clarification, institutions can use the Model Survey's results to determine the nature and number of participation opportunities it must offer to comply with Title IX. Social scientists, advocates, and the courts have recognized that opportunity, combined with other social forces, generates interest.<sup>107</sup> As a result, the Model Survey results are likely to merely reflect and reinforce the status quo in which women's athletic opportunities are disproportionately lower than men's.

An overarching critique levied by the Model Survey's opponents also bears mention. Because OCR did not invite public comment before announcing the 2005 Clarification,<sup>108</sup> there is no way to know whether OCR or its contractors considered any of these problems when developing and adopting the Model Survey.<sup>109</sup>

### 1. Nonresponse Counts as Lack of Interest

The Model Survey allows universities to treat nonresponse as evidence of lack of interest so long as universities give students the opportunity to respond to the survey, explain the purpose of the survey, and inform students that they will consider nonresponse evidence of lack of interest.<sup>110</sup> With these conditions satisfied, an institution can infer lack of interest from nonresponse, which OCR frankly acknowledges "may be high with the e-mail procedure."<sup>111</sup>

In essence, the Model Survey allows universities to infer that a student's nonresponse has significance and meaning—that it reflects a deliberate and informed choice to waive the opportunity to respond affirmatively with interest. In actuality, there is no way to know whether this is the case, or whether other factors, particularly those associated with the manner in which the Model Survey is distributed, explain the student's nonresponse. This subpart explores some factors that are not associated with a student's lack of interest that may cause her not to respond to the Model Survey.

"*I didn't check my e-mail.*" College students spend more time online than any other segment of the population.<sup>112</sup> Most of them check their e-mail

107. See, e.g., SABO & GRANT, *supra* note 102, at 2–3; *infra* Parts III.A.5 & III.B.

108. This decision to release a 100+ page "clarification" (including the Technical Manual and User's Guide) without giving public notice or opportunity to comment defies the Commission's recommendation that OCR make any future substantive adjustments to its enforcement policy "through the normal federal rulemaking process." COMMISSION REPORT, *supra* note 6, at 33 (recommendation two).

109. WOMEN'S SPORTS FOUND., COMPLIANCE LOOPHOLE, *supra* note 102.

110. USER'S GUIDE, *supra* note 53, at 12.

111. 2005 CLARIFICATION, *supra* note 20, at 7.

112. The Pew Internet & American Life Project reports that 86% of college students are online. STEVE JONES ET AL., PEW INTERNET & AM. LIFE PROJECT, THE INTERNET GOES TO COLLEGE: HOW STUDENTS ARE LIVING IN THE FUTURE WITH TODAY'S TECHNOLOGY 2 (2002), available at [http://www.pewinternet.org/pdfs/PIP\\_college\\_report.pdf](http://www.pewinternet.org/pdfs/PIP_college_report.pdf).

frequently.<sup>113</sup> Yet there is documented variation in the degree to which college students use the Internet, including variation based on race and class.<sup>114</sup> Therefore, some students do not use the Internet regularly enough for e-mail to be a reliable means of obtaining their participation in a survey. Even though these students are likely to be a small fraction of the undergraduate population as a whole, their lack of participation may be significant. Collegiate women's sports teams frequently have fewer than twenty players.<sup>115</sup> In that context, the difference between a university's decision that there is sufficient interest and ability to sustain a viable women's team in a particular sport could come down to the difference between twelve students responding with interest and fifteen students responding with interest.<sup>116</sup> When the number of "swing" students is that low, even a small minority of students who do not respond for whatever reason has the potential to affect the survey's results in a legally significant way.

*"I check e-mail, but not that account."* Even among the high percentage of students who use e-mail frequently, universities cannot be sure which e-mail accounts they are using. Students might sign up for a commercial e-mail account to use in addition to or instead of their college-provided e-mail account. These students may check university accounts too infrequently to timely respond to the Model Survey e-mail or e-mails following up with the student's nonresponse. With free commercial e-mail accounts offering larger inbox capacities, better reliability, and more effective technology for blocking unsolicited mass e-mail or "spam,"<sup>117</sup> students have many reasons to rely more heavily on a non-university account.

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113. Seventy-two percent of students check their e-mail once a day. *Id.* Two-thirds have more than one e-mail account. *Id.*

114. Kathleen Korgen et al., *Internet Use Among College Students: Are There Differences by Race/Ethnicity?*, 5 ELECTRONIC J. SOC. (Mar. 2001) (providing statistical evidence of the "gap in Internet use among the major racial and ethnic groups in the United States" and concluding that the digital divide is "alive and well at colleges and universities, even when virtually all college campuses now have Internet access for students").

115. For example, at the University of Iowa, women's teams in softball (18), volleyball (14), basketball (15), field hockey (16), golf (8), cross country (18), gymnastics (13), and tennis (7) all have fewer than twenty players. Only rowing (26), soccer (25), and swimming (23) have more than twenty. See generally University of Iowa, Official Athletic Site, <http://hawkeyesports.com> (last visited Jan. 19, 2006).

116. OCR does not say how many interested players are necessary to require an institution to start a team (or club). In general, OCR will defer to the decisions of the athletic directors and coaches, so long as the number of players chosen has some basis in factors such as "average size of teams" in that sport, "rate of substitutions," variety of skills required, and "effective practices." 2005 CLARIFICATION, *supra* note 20, at 11.

117. See Matthew Hicks, *AOL Readies Web E-Mail Contender*, EWEEK.COM (Dec. 22, 2004), <http://www.eweek.com/article2/0,1759,1745129,00.asp> (describing efforts by AOL, Yahoo, Google, and MSN to be competitive in the Web-based e-mail market); see also SABO & GRANT, *supra* note 102, at 4 (suggesting that "frequent disruptions or periodic shutdowns" of campus e-mail services can contribute to students' use of alternative commercial e-mail accounts).

"My e-mail program thought it was spam." Commercial e-mail programs try to filter unsolicited "spam," blocking the messages or cordoning them into a separate folder. A conscientious student may route e-mail addressed to her university account to the commercial account inbox that she checks regularly, but that commercial account might interpret e-mail sent by the university to large lists of students as spam.<sup>118</sup>

"I'm a little busy right now." Although OCR suggests that e-mail is a permissible method to garner survey participation, it only requires that institutions use a method "designed to generate high response rates" that give students an "easy opportunity to respond."<sup>119</sup> As an alternative to e-mail, a school might choose "to administer the Model Survey as part of the registration process whereby students must complete or actively bypass the Model Survey to register for courses."<sup>120</sup> However, this method also has potential to generate less than full and careful participation in the survey. Students often race to register for limited slots in popular courses. When time is of the essence, even a student with genuine interest and ability to participate in athletics might select the general "not interested" response<sup>121</sup> to proceed with her course registration. A student's future opportunities to participate in athletics should not hinge on her understandable—indeed, commendable—decision to prioritize academics at that particular moment.

"I thought you meant 'athletics.'" Even if students receive the e-mail inviting (or requiring) their participation in the Model Survey, some may avoid participation if they misconstrue the survey's purpose. Based on its title, a student could infer that an "Assessment of Students' Athletic Interests and Abilities" only concerns intercollegiate sports, to the exclusion of intramural and club sports, which are also part of the Model Survey's scope.<sup>122</sup> The fact that many colleges administer intercollegiate athletics out of a department called "athletics" and intramurals and clubs out of a department called "recreation"<sup>123</sup> could contribute to this misimpression. Regardless of their interest in athletics, students who misperceive the nature of the survey (as well as those who are busy, attitudinally predisposed against cooperating with the administration, or pessimistically doubt that their

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118. My personal experience routing e-mail sent to my cornell.edu address to my yahoo.com address exemplifies this problem. E-mail from the university administration frequently ends up in my yahoo.com inbox's unmonitored "bulk mail" folder, presumably because, like spam, it is addressed to a long list of e-mail addresses.

119. 2005 CLARIFICATION, *supra* note 20, at 6.

120. *Id.* at 7.

121. *Id.*

122. SABO & GRANT, *supra* note 102, at 6.

123. For example, the University of Iowa's Department of Recreation Services administers intramural and club sports separate from an Athletics Department reserved for intercollegiate sports. The University of New Hampshire's Department of Campus Recreation does the same. For a contrasting example, Cornell University has a single Department of Athletics and Physical Education that administers teams at all levels of competition.



response will make a difference) are unlikely to respond to the survey. Even if the university continues to solicit their participation under its obligation to “take[] reasonable steps to follow-up with students who do not respond,”<sup>124</sup> these students might reflexively select the blanket “not interested” response to avoid spending more time on a chore that they presume does not apply to them.

## 2. The Target Population Is Illogical

Under OCR’s instructions, universities should only administer the Model Survey to enrolled, full-time undergraduates (either women or the entire student population). While this target population is sensible for measuring interest in intramural and club sports, the existing student body is not the population from which colleges and universities generally recruit for their intercollegiate teams.<sup>125</sup>

For a survey that aims to measure students’ interests and abilities in sports that a university does not already offer,<sup>126</sup> already-enrolled students comprise an illogical target population. Common sense suggests that there is a negative correlation between a student’s high interest and ability in a particular sport and the likelihood that she will enroll<sup>127</sup> at a college that does not provide the opportunity to play at the level she would like.<sup>128</sup> As a result, survey results will only reflect the preferences of a population that is self-selected to be satisfied with the university’s existing athletic offerings.

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124. 2005 CLARIFICATION, *supra* note 20, at 7.

125. As the Commission acknowledged, there is no statistical data about the relative rates of recruited versus walk-on athletes. COMMISSION REPORT, *supra* note 6, at 30. However, because most schools in NCAA Division I and II use athletic scholarships to recruit players, the number of scholarship players offers some indication of how prevalent recruiting is. According to the NCAA, more than 117,000 of 223,000 student-athletes at Division I and II institutions receive either partial or full athletic scholarships. See NCAA Membership Breakdown, [http://www1.ncaa.org/membership/membership\\_svcs/membership\\_breakdown.html](http://www1.ncaa.org/membership/membership_svcs/membership_breakdown.html) (last visited Feb. 24, 2006); NCAA, Undergraduate Athletic Scholarships, <http://www.ncaa.org/about/scholarships/school.html> (last visited Feb. 24, 2006). In addition, while Division III schools (and the Ivy League in Division I) do not offer scholarships, they do recruit players. See NCAA, 2005-2006 DIVISION III COACHES RECRUITING GUIDE (2005), available at [http://ncaa.org/library/membership/recruiting\\_guides/2005-06/2005-06\\_d3\\_recruit\\_guide.pdf](http://ncaa.org/library/membership/recruiting_guides/2005-06/2005-06_d3_recruit_guide.pdf).

126. To be clear, the Model Survey requires institutions to survey both about sports they offer and sports they do not. However, the survey’s only real effect is on opportunities that do not exist; the survey results determine whether a university has to add them or whether it does not.

127. Of course, factors like finances and geography limit students’ agency in selecting a college. But the students with the most options are often those with the most interest and (especially) ability to play intercollegiate sports.

128. Moreover, a theory of postdecisional cognitive dissonance reduction could explain why a student would not report any interest in a particular athletic opportunity that is not offered at the school she chose to attend. See SCOTT PLOUS, THE PSYCHOLOGY OF JUDGMENT AND DECISIONMAKING 28-29 (1993).

### 3. Self-Assessment Is Slanted

After the Model Survey respondent selects the level of competition at which she would ideally like to play, the survey asks her whether she has the ability to play at that level or whether she would “have to develop the ability.”<sup>129</sup> Social structures that antinormalize women’s athletic participation<sup>130</sup> make women less likely to consider themselves “athletes,” with the confidence in physical skill that the label requires.<sup>131</sup> Women are likely to enter college with less prior athletic experience than men, making them more likely to underrate their ability even under optimal survey conditions.<sup>132</sup>

The Model Survey’s response options further aggravate this problem. Any aspiring athlete with even a modicum of humility is not going to arrive at college assuming she already has what it takes to be competitive. She is going to assume that to participate on a competitive varsity team, she must pay her dues, work her way up, learn from the team veterans, and, in the words of the Model Survey, “develop the ability” to play at that level. The fact that university athletic teams routinely redshirt<sup>133</sup> recruited players for a year suggests that these are reasonable assumptions. Model Survey results will thus underrepresent the number of interested athletes who believe they have the ability to eventually play at the level of competition to which they aspire. Survey results slanted in this way will further absolve universities with disproportionate athletic offerings from having to add additional opportunities for women at the highest—intercollegiate, varsity—level of competition.

### 4. The Model Survey Measures Stereotypes, Not Actual Interest

The Model Survey asks students to respond to questions about their interests and abilities.<sup>134</sup> As long as there are fewer students who express interest and ability in a particular sport than are necessary to sustain a team (at whatever level of competition), an institution can use the Model Survey results as evidence that its current offerings comply with Title IX.

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129. TECHNICAL MANUAL, *supra* note 91, at 62.

130. See *infra* Part III (stating that the 2005 Clarification is a departure from structuralist equality reflected in Title IX).

131. SABO & GRANT, *supra* note 102, at 2 (citing, for example, feminist legal scholar Catharine MacKinnon’s reluctance to call herself an “athlete” notwithstanding her regular practice of tae kwon do).

132. *Id.* at 3; WOMEN’S SPORTS FOUND., COMPLIANCE LOOPHOLE, *supra* note 102.

133. A redshirted player practices with the team but does not play in competitions. A team will redshirt freshmen players to improve their skills, while preserving the next four years of NCAA eligibility. See NCAA, Student-Athlete Eligibility, [http://www.ncaa.org/eligibility/faqs/faqs\\_eligibility\\_seasons.html](http://www.ncaa.org/eligibility/faqs/faqs_eligibility_seasons.html) (last visited Jan. 19, 2005).

134. TECHNICAL MANUAL, *supra* note 91, at 62.

Critics predict that the survey results will simply serve as an echo chamber, “institutionaliz[ing] the very discrimination that is and has been the basis for women’s lack of opportunity to participate in sports.”<sup>135</sup> The stereotype that women are less interested and less capable of participating in sports is what caused universities to offer disproportionately fewer female opportunities in the first place.<sup>136</sup> Circularly, the fact that women have fewer opportunities to play competitive sports contributes to the stereotype that they are less interested in doing so. Therefore, the “true extent” of women’s interests and abilities in athletics is obscured by the component of espoused interest that is socially constructed by stereotypes of women’s interests.<sup>137</sup> As such, interest can neither be measured nor fairly employed as a benchmark for compliance. This criticism, which addresses the 2005 Clarification’s most fundamental flaw, is the subject of a full analysis in the next Part.

### III. 2005 CLARIFICATION IS A DEPARTURE FROM STRUCTURALIST EQUALITY REFLECTED IN TITLE IX

The Model Survey’s critics are correct to argue that relying on survey responses to define the number of participation opportunities required under Title IX will only reinforce the existing disparity in athletic opportunities that institutions provide for men and women. For this argument to have legal relevance beyond merely classifying the 2005 Clarification as a bad policy choice, this Part necessarily considers whether the 2005 Clarification is a departure from the theory of equality reflected in Title IX.

Title IX demands women’s inclusion in all aspects of federally funded education programs.<sup>138</sup> It forbids the exclusion of women from participation and denial of benefits enjoyed by men. In that sense, Title IX reflects a formal equality theory that was dominant among liberal feminists in the 1970s.<sup>139</sup> The goal of formal equality is gender-neutral policies that allow women access to privileges on the same terms as men.<sup>140</sup> Generally, though, formal equality accepts that an individual is entitled to equal treatment only to the extent she or he is similarly situated to a privileged group.<sup>141</sup> In

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135. WOMEN’S SPORTS FOUND., COMPLIANCE LOOPHOLE, *supra* note 102.

136. *Id.*

137. SABO & GRANT, *supra* note 102, at 2.

138. 20 U.S.C. § 1681(a) (2000).

139. MARY JO FESTLE, PLAYING NICE: POLITICS AND APOLOGIES IN WOMEN’S SPORTS 111 (1996).

140. MICHAEL J. COZZILLIO & ROBERT L. HAYMAN, JR., SPORTS AND INEQUALITY 405 (2005).

141. Deborah Brake, *The Struggle for Sex Equality in Sport and the Theory Behind Title IX*, 34 U. MICH. J.L. REFORM 13, 22, 25–26 (2000–2001); Vicki Shultz, *Telling Stories About Women and Work: Judicial Interpretations of Sex Segregation in the Workplace in Title VII Cases Raising the Lack of Interest Argument*, 103 HARV. L. REV. 1749, 1806 (1990); Yuracko, *supra* note 15, at 734; Note, *Cheering on Women and Girls in Sports: Using Title IX to Fight Gender Role Oppression*, 110 HARV. L. REV. 1627, 1634 (1997) [hereinafter Note].

determining whether an individual is so similarly situated, formal equality roots out sex stereotypes and eliminates them as the basis for different treatment. “Real” sex differences, however, are a permissible basis for different treatment.<sup>142</sup>

As applied to athletic participation, a model of formal equality would ensure that women who are interested in sports receive treatment similar to men who are interested in sports, so long as “interest in sports” is a genuine, innate sex difference. Therefore, formal equality requires consideration of whether men’s and women’s relative athletic preference is a natural, and thus permissible, basis for disparate treatment, or whether that gender difference is constructed by social structures. This Article refers to the latter as structuralism.<sup>143</sup>

The question of which gender differences are biological and which are constructed is not amenable to an easy answer.<sup>144</sup> Absent proof that athletic interest is innate, we must accept that traditional social structures that marginalize women’s athletic participation are responsible—to some unquantifiable extent—for any reported lack of interest in athletics. When a university proffers survey evidence demonstrating women students’ purported lack of interest to immunize its disproportionate athletic opportunities from legal challenge, as the 2005 Clarification allows, it retains its place among the social structures constructing that lack of interest in the first place. Thus, the 2005 Clarification renders Title IX useless as an antidiscrimination measure.

This Part first describes the medical, social, educational, and legal structures that have effectively antinormalized women’s participation in sports. Second, it suggests that Title IX has accounted for the social structures that operate to limit women’s participation in sports. In particular, the language of the three-prong policy, bolstered by the federal appellate courts’ interpretation, deliberately makes prong-three compliance—the only measure that looks at women’s interests and abilities—a difficult and unstable measure of compliance. As the courts explain, this is because interest-defined compliance depends on socially constructed stereotypes, and not on women’s actual interests. Because prong-two compliance, which examines history and continuing practice of program expansion, is equally unsustainable,<sup>145</sup> OCR and the courts had appropriately engineered a three-prong policy that actually has a proportionality-seeking effect.

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142. COZZILLIO & HAYMAN, *supra* note 140, at 405 (defining structuralism and contrasting it with formal equality).

143. *Id.*

144. See Steven Pinker, *Why Nature and Nurture Won't Go Away*, DAEDALUS, Fall 2004, at 5.

145. See *supra* note 53 and accompanying text.

Third, this Part argues that the 2005 Clarification abandons Title IX's underlying structuralism in two related ways. First, in light of the cultural history described in Part III.A, a survey of women's interests in athletics is likely, to some unknowable degree, to measure women's responses to (or accommodation of) constructed antinormalization of women's athletic participation rather than some essential lack of desire to participate to the same extent as men. Moreover, it provides universities with an easier way to comply with Title IX's requirements than substantial proportionality. Prior to 2005, OCR and the federal courts had employed a structuralist rationale to make the third prong into a tough, unstable measure of compliance. By allowing reported interest levels to define equality, the 2005 Clarification strips the three-prong test of its power to push institutions toward proportionality, which had ensured that they could not get too comfortable with prong-three compliance.

Finally, even if interest in athletics appropriately limits the class of men and women who are "similarly situated" for the purposes of achieving formal equality, OCR's new approach does not actually provide similar treatment to sports-interested women as to sports-interested men. Currently enrolled women must prove their interests and abilities in nonexistent opportunities to receive a proportionate share of athletic opportunities. In contrast, coaches and administrators will continue to recruit interested and capable male athletes to fill existing opportunities. The 2005 Clarification therefore fails, under any measure, as an anti-discrimination policy.

#### A. *THE ANTINORMALIZATION OF WOMEN IN SPORTS*

History shows that our culture has been anything but gender neutral in its relationship to sports. The medical establishment, religious and moral views, educational values, and law have each contributed to the pervasive societal view of sports as a masculine realm. Within this context, women's participation in sports defies gender normativity. Women who do play sports exhibit apologetic or compensatory behavior, which helps demonstrate, and more importantly, perpetuate the idea that femininity and athletics are mutually exclusive. Even in our Title IX world, society sends women and girls clear and subtle signals that their participation in athletics is abnormal. In fact, Title IX, both the law itself as well as the backlash against it, contributes to this perception. This antinormalization suppresses women's athletic interest and participation.

##### 1. Medical and Moral Structures

The muscular Christianity movement, imported from Europe in the mid-nineteenth century, introduced Americans to the idea that sports were integral to the development of men, who society worried were becoming too

effeminized by their increasing employment in white-collar jobs that did not require physical labor.<sup>146</sup> Athletics, which developed "physical presence, stoic courage in the endurance of pain, and judgment under pressure," were deliberately touted as the antidote to this perceived weakness.<sup>147</sup> In this context, participating in athletics was as much about defining what it means to be a man as what it means to be *not* a woman. Reclaiming masculinity through sports therefore required the exclusion of women.<sup>148</sup>

Biological differences between men and women provided a more acceptable rationale for excluding women from sports. The medical establishment considered it unhealthy for women to exercise during menstruation and warned that those who did so put their prized fertility at risk.<sup>149</sup> Other medical excuses, such as the theory that women were allocated a fixed amount of physical energy that had to be reserved for reproductive functions, also contributed to the biological basis for constructing the prevailing view that men's participation in sports was natural and women's was not.<sup>150</sup> From the late 1800s through the 1940s, conventional medical advice warned that exercise, or too much exercise, put women at risk of uterine displacement, malformed breasts, and menstrual and childbirth complications.<sup>151</sup> These theories gave rise to the emerging—and enduring—myth of female fragility.<sup>152</sup> Though the medical establishment came to

146. SUSAN K. CAHN, COMING ON STRONG: GENDER AND SEXUALITY IN TWENTIETH-CENTURY WOMEN'S SPORT 11 (1994); David Whitson, *Sport in the Social Construction of Masculinity*, in SPORT, MEN, AND THE GENDER ORDER: CRITICAL FEMINIST PERSPECTIVES 19, 21 (Michael A. Messner & Donald F. Sabo eds., 1990) [hereinafter SPORT, MEN, AND THE GENDER ORDER].

147. Whitson, *supra* note 146, at 21.

148. FIELDS, *supra* note 35, at 154–55; Whitson, *supra* note 146, at 24 ("A proving ground for masculinity can only be preserved by the exclusion of women from the activity."). Catharine MacKinnon offers a different, though related, theory. See generally Catharine A. MacKinnon, *Women, Self-Possession, and Sport* (1982), in FEMINISM UNMODIFIED: DISCOURSES ON LIFE & LAW 117 (1987). Like harassment, rape, and the relegation of women to the private sphere, excluding women from sports is another means of establishing—and perpetuating—women's subordinate status to men. *Id.* Because an athletic woman possesses physical power and strength and an awareness of body and self, she is less susceptible to men's dominance. *Id.* The construction of hegemonic masculinity of sport was no benign accident, but rather, it was an intentional rendering of women as accessible, passive, and "rapeable." *Id.*

149. FIELDS, *supra* note 35, at 2; JENNIFER HARGREAVES, SPORTING FEMALES: CRITICAL ISSUES IN THE HISTORY AND SOCIOLOGY OF WOMEN'S SPORTS 43 (1994); HELEN LENSJY, OUT OF BOUNDS: WOMEN, SPORT AND SEXUALITY 25–27 (1986) (describing the "sacred" and "patriotic" status of motherhood that gave rise to such concerns).

150. HARGREAVES, *supra* note 149, at 45. In contrast, it was believed that in men, athletic activity rejuvenated the body's energy reserves to aid the production of sperm. Todd Crosset, *Masculinity and the Development of Early Modern Sport*, in SPORT, MEN AND THE GENDER ORDER, *supra* note 146, at 52.

151. LENSJY, *supra* note 149, at 20, 27–29. These concerns appeared to be limited to physical exertion on a recreational basis. The physical demands of housework did not give rise to similar threats. *Id.* at 29.

152. *Id.* at 19–20.

accept that certain limited physical activity was acceptable and healthy for women,<sup>153</sup> medical arguments helped sustain the exclusion of women and girls from the more physical and aggressive sports for decades.<sup>154</sup>

Victorians isolated women from the exciting frenzy of sports in order to preserve their chastity.<sup>155</sup> In the 1920s and 1930s, society criticized the bobbed-hair, boyish-looking flappers who began to challenge these restrictions as hypersexual.<sup>156</sup> Later, as society became increasingly aware—and apprehensive—of its gay subculture, the fear that sports lead to sexual promiscuity was replaced by a fear that they lead to sexual deviance.<sup>157</sup> Engaging in activity that embodied aggressiveness, competitiveness, and perseverance—values already appropriated as masculine—female athletes' perceived "mannishness" made them vulnerable to the charge of being, at best, unfeminine, and at worst, lesbians.<sup>158</sup> Neither charge was very good for a woman's marriage prospects.<sup>159</sup> Both flew in the face of the Cult of True Womanhood, the dominant social view that as men's wage labor moved out of the home and into the public sphere, women's role was to remain in the home and raise the children.<sup>160</sup> Historian Mary Jo Festle sums up the social forces deterring women's participation in sports in the early half of the twentieth century: "Conservative ideas about gender combined with sports'

153. See *id.* at 24, 33. This realization was due, in large part, to the contributions of women in the medical field. *Id.* at 25–27.

154. See, e.g., *Magill v. Avonworth Baseball Conference*, 364 F. Supp. 1212, 1216–17 (W.D. Pa. 1973) (denying an equal protection claim arising from a municipal baseball league's exclusion of girls as rationally related to medical and safety concerns); Suzanne Sangree, *Title IX and the Contact Sports Exemption: Gender Stereotypes in a Civil Rights Statute*, 32 CONN. L. REV. 381, 421–30 (2000) (describing the frailty rationale for the exclusion of women and girls from contact and noncontact sports). Medical beliefs, such as the perceived link between jumping and uterine displacement, also resulted in modified rules for girls' basketball. See LENSKEY, *supra* note 149, at 28; *infra* notes 190–91 and accompanying text.

155. See CAHN, *supra* note 146, at 165–66. The Victorians even feared the "undercurrent of sexual excitement" in the game of croquet. ALLEN GUTTMAN, *WOMEN'S SPORTS: A HISTORY* 119 (1991).

156. CAHN, *supra* note 146, at 165–66 (explaining that "[b]etween 1900 and 1930 the sexual debate in sport centered on the problem of unbridled heterosexual desire").

157. *Id.* at 164–68 (explaining that the derogatory term for female athletes of the day, "muscle moll," invoked an image of "promiscuous working-class sexuality" and prostitution).

158. *Id.* at 164–66; FESTLE, *supra* note 139, at 22; LENSKEY, *supra* note 149, at 74–76.

159. GUTTMAN, *supra* note 155, at 95 ("Sports, however, were thought by many to spoil a girl's looks, to diminish her charm, and thus to hamper her in the all-important race to matrimony."); LENSKEY, *supra* note 149, at 74 (describing how women who "lacked the feminine traits of emotionalism, passivity, and helplessness that validated masculine identity" were portrayed as "unappealing" to men).

160. Sangree, *supra* note 154, at 402. The same social forces operated to encourage boys to play sports, which were believed to compensate for the feminizing effect of spending so much time with their mothers in the absence of their working fathers. *Id.* at 402–03.

historic association with masculinity in a powerful one-two punch knocking most women out of sports."<sup>161</sup>

## 2. The Role of Women Physical Educators

The physical education programs that colleges and universities developed in the early half of the twentieth century contributed to women's (and society's) attitudes about sports. Buoyed by the medical establishment's changing views on women's physical activity,<sup>162</sup> female professional physical educators picked up the mantle and started implementing physical education curricula for their female students. Still, criticism that such efforts "risked their [students'] modesty, mental health, and maternal capacity"<sup>163</sup>—as well as the educators' own tenuous positions of power and influence<sup>164</sup>—forced them to espouse a "moderated" athletics regimen for women.<sup>165</sup>

The women who controlled the physical education curricula at colleges and universities created programs for female students that were markedly different from the programs offered to male students. They promoted the ideal of a generalist "sportswoman," a woman who was reasonably competent in a variety of sports and games, rather than that of an "athlete" who specialized in one or few sports.<sup>166</sup> They emphasized companionship over competition and endeavored to protect women from exploitation.<sup>167</sup> These values were incompatible with varsity-type athletics programs that set rosters, regular practices, and a schedule of extramural play.<sup>168</sup>

Instead, the educators favored intramural matchups, which were free from the public gaze, and the occasional extracurricular "play day" that mitigated competition by creating ad-hoc teams mixing women from the

161. FESTLE, *supra* note 139, at 7. Given the context of this Article, it is worth noting that Festle cites the results of an interest survey administered by an Ohio State graduate student in 1958. *Id.* at 295 n.13. The most common reasons that the survey respondents gave for their reluctance to participate in sports "demonstrated their sensitivity to sports' unfeminine reputation:" muscles, masculinity, moral and ethical transgressions, bad taste, and societal disapproval. *Id.*

162. CAHN, *supra* note 146, at 12 (explaining that doctors also came to believe that young women's exercise was good preparation for the physicality of childbearing); HARGREAVES, *supra* note 149, at 60 (noting that doctors began prescribing moderate exercise regimens for women after concluding that sedentary lifestyles were unhealthy).

163. CAHN, *supra* note 146, at 22.

164. As women, their status within the academy was lower than men's, and their field, physical education, did not enjoy the prestige of academic disciplines. FESTLE, *supra* note 139, at 25. In light of their low status and the fact that they promoted behavior that was only "marginally acceptable" for women, women physical educators' conservative philosophy can be interpreted as pragmatic self-preservation. *Id.* Their jobs depended on their ability to ensure that their students portrayed a socially acceptable image. *Id.*

165. CAHN, *supra* note 146, at 23.

166. *Id.* at 64–65; FESTLE, *supra* note 139, at 12; GUTTMAN, *supra* note 155, at 139.

167. FESTLE, *supra* note 139, at 11–12.

168. *Id.* at 16.



different schools.<sup>169</sup> They also favored sports that society recognized as acceptable for women (especially educated, upper- and middle-class women) such as "country club" sports, which women could play with their future husbands.<sup>170</sup> These sports, like golf, tennis, swimming, and badminton,<sup>171</sup> were less sweaty and void of physical contact.

In retrospect, it seems ironic and unfortunate that it was female physical educators who zealously implemented and defended a curriculum that demonstrably repressed women's athletic abilities and interest in "disfavored" sports.<sup>172</sup> But as much as the educators' value choices contributed to a limited and qualified normative view of women and sports, these values were themselves a likely product of that normative view.<sup>173</sup> The educators could not offer competitive varsity programs in team sports because their institutions did not budget enough money for uniforms, did not give them any equipment, gave men's teams priority in all practice fields and facilities,<sup>174</sup> and did not hire enough staff to coach women's teams.<sup>175</sup>

The educators' generalist values and adamant intramural philosophy may have been a rationalization of the fact that they could not offer an alternative.<sup>176</sup> Their decision to favor companionate and non-exertive sports over competitive, physical, or contact sports may have been a pragmatic response to society's view of certain sports as unfeminine, a choice to protect the limited opportunities they could offer from backlash that would surely accompany a decision to push the envelope.<sup>177</sup> Historian Mary Jo Festle surmises that the conservative philosophy of female physical educators, itself an "accommodation to prejudice against female athletes," perpetuated that very prejudice by reinforcing society's regard of a woman athlete as "inappropriate and unfeminine."<sup>178</sup> She continues: "It fed more fuel to the cycle, begun in the late 1920s in which women chose not to aspire athletically because it was unusual; then it remained unusual."<sup>179</sup>

169. CAHN, *supra* note 146, at 66; FESTLE, *supra* note 139, at 15; GUTTMAN, *supra* note 155, at 136–37, 140–41.

170. FESTLE, *supra* note 139, at 11–12, 23.

171. *Id.* at 11–12. Festle also reports that physical educators used women's responses to interest surveys to justify their decisions to de-emphasize sports like track and field. *Id.* at 11. The environment in which these women developed their sports preferences was adorned with posters warning women students: "Don't Be a Muscle Moll." *Id.* at 22.

172. *Id.* at 16–17.

173. *See id.* at 19.

174. *Id.* At the University of North Carolina, for example, the only outdoor facility that was available for any women's team was the football field—the end zone only!—when no men's team was using it. *Id.*

175. FESTLE, *supra* note 139, at 18–19.

176. *Id.* at 19.

177. *Id.* at 20–21.

178. *Id.* at 26.

179. *Id.*

### 3. Modified Sports and Apologetic Behavior

Notwithstanding the purported health risks, educators' early efforts to restrict women's opportunities in competitive and physical sports, and the widespread and growing belief that the "athletic woman" was oxymoronic, women did in fact play sports throughout the twentieth century.<sup>180</sup> Schools, industrial leagues, and community leagues provided women and girls the chance to participate in basketball and track. The Amateur Athletic Union sponsored many women's tournaments, including track and field, swimming, gymnastics, basketball, and handball.<sup>181</sup> There were even semiprofessional opportunities for women basketball and baseball players.<sup>182</sup>

Opportunities at the college level also began to improve toward the end of the 1950s as the female physical educators embraced a more comprehensive and competitive sports curriculum—partially in response to social and political pressure attributable to the Cold War.<sup>183</sup> Nationalistic pride incited the drive to earn more medals than Russia at the 1956 and 1960 Olympic Games, fueling a cultural acceptance and encouragement of female athletes.<sup>184</sup> The newly formed U.S. Olympic Development Committee and the President's Council on Youth sought to expand girls' and women's physical-education curricula to raise the general fitness level among women.<sup>185</sup> The organizations also aimed to identify and support rising athletic stars.<sup>186</sup> This cultural shift compelled or freed female physical educators to endorse physical sports for women, including gymnastics, track and field, and basketball.<sup>187</sup> Eventually, the shift led educators to create an organization to sponsor intercollegiate tournaments.<sup>188</sup>

Yet even within these opportunities, women's participation was qualified in ways that reinforced the hegemonic masculinity of sports. First, even though women played and excelled in all kinds of sports, far fewer women did so than men.<sup>189</sup> Also, some sports employed different rules for women

180. FESTLE, *supra* note 139, at 32.

181. GUTTMAN, *supra* note 155, at 138.

182. CAHN, *supra* note 146, at 142–53 (describing the All-American Girls Professional Baseball League, which operated from 1943 through 1954); GUTTMAN, *supra* note 155, at 211–12; MAX MCELWAIN, *THE ONLY DANCE IN IOWA: A HISTORY OF SIX-PLAYER GIRLS' BASKETBALL* 72–73, 121 (2004) (describing barnstorming semi-professional women's basketball teams).

183. CAHN, *supra* note 146, at 130–31; FESTLE, *supra* note 139, at 94–97.

184. FESTLE, *supra* note 139, at 89.

185. *Id.* at 89–90.

186. *Id.*

187. *Id.* at 96.

188. *Id.* The female physical educators did not share or espouse the government's goal of beating the Russians and continued to deemphasize the importance of winning. *Id.* at 96–97.

189. See, e.g., COMMISSION REPORT, *supra* note 6, at 12–13. The Commission acknowledged discriminatory practices in the pre-Title IX era that denied intercollegiate and interscholastic athletic opportunities to female students and resulted in much lower participation rates among women. *Id.* For example, in the 1966–1967 school year, 15,182 women competed in

that made the game less physical and virtually contact-free. Girls' basketball, for example, limited players to half- or third-court zones, though under some rules one player, a rover, could run the full court.<sup>190</sup> Girls were limited in the number of times they could dribble before passing to a teammate. Fouling was more severely punished than in the boys' game. These modifications set the girls' game apart from the "regular" version of the game that boys played. In this way, girls' rules were both produced by and contributed to the idea that women were not fully capable athletes.<sup>191</sup> Another difference between men's and women's sports was—and continues to be<sup>192</sup>—the lack of media coverage and public attention.<sup>193</sup> With some exceptions—rural Iowa, for example, where communities' enthusiasm and support for girls' high school basketball equaled or rivaled that for boys,<sup>194</sup>—women's basketball, especially the adult amateur game, was not widely publicized.<sup>195</sup> Historians suggest that this silence suppressed participation by keeping women from finding out about opportunities to play, and it also contributed to the normative view that women were not athletes.<sup>196</sup>

In addition to having distinctly different participation rates, rules, and status in the popular culture, women's participation in sports is modified by its deference to "compulsory" norms of femininity and heterosexuality.<sup>197</sup> To dodge the lesbian epithet<sup>198</sup> and the related, constructed paradox of the

intercollegiate sports, compared to 151,918 men. *Id.* at 13. There was a similar ten-fold disparity in the gender breakdown of high school athletes in the early 1970s. *Id.*

190. FESTLE, *supra* note 139, at 31–32; MCELWAIN, *supra* note 182, at 6.

191. LENSJY, *supra* note 149, at 28.

192. A recent study shows that the alarmingly low percentage of local news sports broadcasts devoted to women's sports fifteen years ago (about 5%) is not much higher (only about 6%) today. The study also reports a 20:1 ratio of men's to women's sports coverage on the national channel ESPN. The researchers also note occasional instances (though more rare than in previous studies) in which coverage of women's sports sexualized or trivialized women. MARGARET CARLISLE DUNCAN & MICHAEL A. MESSNER, GENDER IN TELEVISED SPORTS: NEWS AND HIGHLIGHTS SHOWS, 1989–2004, at 4–5 (July 2005), available at <http://www.aaflo.org/garr/researchreports/tv2004.pdf>.

193. FESTLE, *supra* note 139, at xxiv, 91–94.

194. MCELWAIN, *supra* note 182, at 9.

195. FESTLE, *supra* note 139, at 41–42.

196. *Id.* at 53 ("According to sports pages, coaches, rulebooks, Library of Congress headings, and the popular mind, it was not 'basketball'—it was 'girls basketball.' The word *basketball* connoted boys' basketball, just as an *athlete* referred to a male unless otherwise qualified.").

197. See generally FESTLE, *supra* note 139, at 45–46; LENSJY, *supra* note 149, at 73–107.

198. See generally PAT GRIFFIN, STRONG WOMEN, DEEP CLOSETS: LESBIANS AND HOMOPHOBIA IN SPORT 68–78 (1998) (describing women's sports' deliberate effort to promote a heterosexual and heterosexy image to negate lesbians' perceived and actual presence). For a recent, specific example of this phenomenon, see Complaint, Harris v. Portland, Civ. A. No. 05-2648 (M.D. Pa. Dec. 21, 2005). Jennifer Harris, a former Penn State basketball player, alleged that coach Rene Portland forced her off the team because Portland perceived that she is a lesbian. Complaint, *supra*, at 3, 12–20; see also Genaro C. Armas, PSU Basketball Coach Denies New Accusations, CENTRE

"woman athlete,"<sup>199</sup> women in sports have been subject to, complied with, and promoted efforts to portray traditional female attributes like grace, beauty, and desire for men.<sup>200</sup> State and national tournaments no longer include beauty pageants,<sup>201</sup> and compulsory grooming and etiquette classes<sup>202</sup> have also fallen out of favor. But media coverage and organized promotion of women's sports continues to emphasize the ways in which female athletes demonstrate culturally accepted female attributes and behavior.<sup>203</sup> Less subtly, female athletes who do not conform to the feminine

DAILY TIMES, Nov. 10, 2005, at B1 (quoting Harris as charging that Portland "continually harassed me to change my appearance and my image because she thought I was not 'feminine' enough"). Portland claims that her decision to dismiss Harris was a "basketball decision," Armas, *supra*, at B1, even though Harris started in twenty-two of thirty games in the 2004–2005 season and had the highest scoring record among the players on the team who were eligible to return in the 2005–06 season. Complaint, *supra*, at 22–23. Portland has long been renowned for her negative recruiting tactics and anti-lesbian policy. See Bill Figel, *Lesbians in World of Athletics*, CHI. SUN-TIMES, June 16, 1986, at 119 ("One of the first things Penn State coach Rene Portland brings up during a recruiting visit with a prospective player and her parents is lesbian activity. 'I will not have it in my program,' Portland said.").

199. MacKinnon, *supra* note 148, at 120 ("Femininity has contradicted, masculinity has been consistent with, being athletic. Women get to choose between being a successful girl and a successful athlete."). MacKinnon suggests that the lesbian epithet helps construct the connection between women's athletic strength and sexual inaccessibility. *Id.* at 122. This explains why the epithet is used to suppress—or at least demand apologetic behavior as the price for—women's participation in sports. *Id.*

200. See FESTLE, *supra* note 139, at 45.

201. *Id.* at 49–50 (describing the player beauty pageant at the AAU women's basketball tournament); CAHN, *supra* note 146, at 135–36; MCELWAIN, *supra* note 182, at 49–50, 91, 95–96 (describing the "health contest" that was a component of the Iowa high school state tournament program until the 1940s, as well as the annual designated "cover girl" photographed for the tournament guide until 1992).

202. CAHN, *supra* note 146, at 156 (describing the All-American Girls' Professional Baseball League's compulsory charm school); LENSJY, *supra* note 149, at 82.

203. Alina Bernstein, *Is It Time for a Victory Lap? Changes in Media Coverage of Women in Sport*, 37 INT'L REV. SOC. SPORT 415, 420–21 (2002) (documenting various "different practices by which the media trivialize, and therefore undermine, women's athletic achievements, thus constructing female athleticism as not only 'other than' but as 'lesser than' the male's" including instances of sexual objectification, infantilization, and trivialization of women athletes); Susan Tyler Eastman & Andrew C. Billings, *Sportscasting and Sports Reporting: The Power of Gender Bias*, 24 J. SPORT & SOC. ISSUES 192, 208–210 (2000) (documenting gender bias in sports commentary, including that "the dating habits and families of women athletes were referred to more frequently than those of men"); Michael A. Messner et al., *Silence, Sports Bras, and Wrestling Porn: Women in Televised Sports and Highlights Shows*, 27 J. SPORT & SOC. ISSUES 38, 47–49 (2003) (concluding that sportscasters devote most of their "sparse" coverage of women's sports to sexualizing female athletes and using them as the brunt of jokes).

This is no modern trend; throughout the history of women's sports, its coverage and promotion has attempted to normalize athletic participation by emphasizing the "female" in "female athlete." FESTLE, *supra* note 139, at 48–49 (describing efforts of the Amateur Athletic Union in the 1950s to normalize women's athletic participation by emphasizing their desire for motherhood and marriage); LENSJY, *supra* note 149, at 75 (describing efforts of "well-meaning journalists" in the 1930s to portray female athletes as "having lost none of their femininity" by describing them as "sweet and ladylike," groomed and attractive); Mary Jo Kane, *The Post Title IX*

heterosexual idea are shunned and ostracized.<sup>204</sup> Both practices reinforce the social construct of a female athlete as a lesser or qualified version of a “normal” male athlete, which is also reflected in the resulting “apologetic behavior” of female athletes. Female athletes consciously or unconsciously endeavor to “minimiz[e] the perceived violation of social norms” as the price for playing sports.<sup>205</sup> Apologetic behavior may be evident when, for example, girls take up cheerleading, which is culturally perceived as an acceptable feminine activity,<sup>206</sup> either as “cover” for, or an alternative to, activity that is more readily perceived as athletic.<sup>207</sup> Or when players don makeup and wear their hair long.<sup>208</sup> Or when women espouse preferences for male over female coaches<sup>209</sup> or for the gendered team nicknames—à la “Lady Volunteers”—that reinforce the assumption that athletics, unqualified, is male.<sup>210</sup> Apologetic behavior thus demonstrates not only the pressure women feel to participate in society’s efforts to reduce the cognitive dissonance inherent in

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*Female Athlete in the Media*, J. PHYSICAL EDUC., RECREATION & DANCE, Mar. 1989, at 58 (depicting a 1989 media guide at Northwestern Louisiana State in which the women’s basketball team posed with bunny ears and tails under the caption, “These Girls Can Play, Boy”).

204. GRIFFIN, *supra* note 198, at 86 (describing how the lesbian epithet is used to “control, discredit, and intimidate women in sport”); Don Sabo & Sue Curry Jensen, *Prometheus Unbound: Constructions of Masculinity in Sports Media*, in *MEDIASPORT* 213–14 (Lawrence A. Wenner ed., 1998) (pointing out examples of lesbian-baiting by the sports media and arguing that the practice “preserves the male hegemony in sport and society”). For an historic example of this trend, see LENSKEY, *supra* note 149, at 85 (attributing efforts by female educators to screen out erstwhile physical education majors of “masculine-type” to a fear of “guilt by association”).

205. FESTLE, *supra* note 139, at 45; *id.* at 46 (“Historians cannot know the full extent to which stigma constrained a woman athlete. After all, plenty of women played despite it. Still, the prevalence of public apologetic behavior among female athletes is a trend that both academics and athletes have long acknowledged.”); *see also* CAHN, *supra* note 146, at 145.

206. *See, e.g.*, Laurel R. Davis, *Male Cheerleaders and the Naturalization of Gender*, in *SPORT, MEN, AND THE GENDER ORDER*, *supra* note 146, at 153, 154.

207. LENSKEY, *supra* note 149, at 103; Note, *supra* note 141, at 1632.

208. Note, *supra* note 141, at 1632–33; *id.* at 1632 (“One need only count the number of female athletes who wear their hair long and in ponytails . . . to see that these instances are not isolated ones.”). Relatedly, every single player in the 2005 Women’s College World Series had long hair, and a majority of players wore makeup. One could suppose that such uniform and prevalent self-sexualization in today’s college softball is deliberate compensation for softball’s historic association with lesbians.

In 2004, the U.S. Women’s National Soccer Team named their official fan club the “Ponytail Posse.” The players explain that the name is “meant to convey the combination of femininity and athleticism that is inherent in putting your hair up in a ponytail.” *See* Ponytail Posse, [http://ponytailposse.com/handler.cfm?cat\\_id=171827cat\\_id=17183](http://ponytailposse.com/handler.cfm?cat_id=171827cat_id=17183) (last visited Feb. 24, 2006).

209. GRIFFIN, *supra* note 198, at 84; Kristine E. Newhall, *Quality on Ice: Gender and Coaching in Women’s Ice Hockey* (May 4, 2004) (unpublished master’s thesis, Simmons College) (on file with author) (finding evidence of this attitude among college women hockey players).

210. Brake, *supra* note 141, at 110–11. Whether it is the Nittany Lions versus the Lady Lions or the Final Four versus the Women’s Final Four, the lopsided use of gender qualifiers contributes to the construction of athletics that are, by default, masculine. *See id.*

the constructed paradox of the women athlete but also of the very existence of that cultural construction.

#### 4. Title IX and Its Backlash

Title IX has increased opportunities for women's athletic participation over the last thirty years and has positively influenced women's interests and abilities in sports.<sup>211</sup> At the same time, some aspects of the law itself, as well as society's reaction to it, have contributed to the antinormalization of women's sports. This subpart examines Title IX's antinormalization of women's sports in the following major areas: contact sports, expenditures, and scholarships. It analyzes how society's backlash against the opportunities that Title IX has provided to female students furthers this antinormalization.

##### *a. Contact Sports*

The Title IX implementing regulations require schools that do not offer a women's team in a particular sport to allow women to try out for a men's team in that sport.<sup>212</sup> This provision is qualified, however, by an exception for all contact sports. A school must let a woman<sup>213</sup> try out for the only tennis

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211. See generally Trudy Saunders Bredthauer, *Twenty-Five Years Under Title IX: Have We Made Progress?*, 31 CREIGHTON L. REV. 1107 (1998); Note, *supra* note 141, at 1640–41; COMMISSION REPORT, *supra* note 6, at 10 (“I was here in 1972 when there was really no interest on the part of girls to participate, and the high school participation at that time was 8%. The schools were forced to offer opportunity, and my goodness, it's now up to 42 percent.”) (quoting Christine Grant, Associate Professor and former Athletic Director, University of Iowa).

212. This regulation, titled “Separate Teams,” reads in full:

Notwithstanding the requirements of paragraph (a) of this section [prohibiting gender discrimination in interscholastic, intercollegiate, club or intramural athletics], a recipient may operate or sponsor separate teams for members of each sex where selection for such teams is based upon competitive skill or the activity involved is a contact sport. However, where the recipient operates or sponsors a team in a particular sport for members of one sex but operates or sponsors no such team for members of the other sex, and athletic opportunities for members of that sex have previously been limited, members of the excluded sex must be allowed to try-out for the team offered unless the sport involved is a contact sport. For the purposes of this part, contact sports include boxing, wrestling, rugby, ice hockey, football, basketball and other sports the purpose or major activity of which involves bodily contact.

34 C.F.R. § 106.41(b) (2005).

213. The regulation refers not to women but to members of the sex whose athletic opportunities have been previously limited. *Id.* Courts have rejected a sport-specific construction of “previously limited athletic opportunities” advanced by men attempting to integrate women's field hockey teams. *Williams v. Sch. Dist. of Bethlehem*, 998 F.2d 168, 174–75 (3d Cir. 1993); *Kleczeck v. R.I. Interscholastic League, Inc.*, 768 F. Supp. 951, 954–55 (D.R.I. 1991). In both cases, the court held that, even if the plaintiffs satisfied the previously limited athletic opportunities requirement, field hockey's status as a contact sport thwarted efforts for relief. *Williams*, 998 F.2d at 173–74 (finding enough evidence to preclude plaintiffs' summary

or swimming team it offers, but when it comes to football, basketball, baseball, ice hockey, rugby, wrestling, or boxing—the contact sports enumerated in the regulations—schools can bar women from trying out for the only team.<sup>214</sup> Further, while a school may opt to add a women's basketball or hockey team to improve its proportionality numbers, it has no obligation to do so unless women can demonstrate that there is enough interest on campus to field an entire, reasonably competitive team.<sup>215</sup> By allowing schools to exclude women from playing contact sports with men, the regulation reflects an assumption that women are too weak and frail to play with men<sup>216</sup>—an assumption that is sometimes accompanied by express rhetoric relegating contact sports to an exclusively male domain.<sup>217</sup>

Moreover, the regulation's failure to require schools to provide equivalent teams for the women who are excluded from participating on men's teams contributes to association of those sports with masculinity. This message is further amplified by the regulation's distinctly different treatment of noncontact sports, under which schools are required to give women opportunities to participate.<sup>218</sup> In these various ways, the regulation “locks in place the construction of particular sports as masculine and

judgment); *Kleczech*, 768 F. Supp. at 955–56 (holding that field hockey's incidental bodily contact renders it a contact sport).

214. See, e.g., *George*, *supra* note 32, at 1114–15. Even though schools are not obligated under Title IX to let women try out for men's teams in contact sports, a state-sponsored educational institution's failure to do so may violate the Equal Protection Clause. See, e.g., *Fortin v. Darlington Little League*, 514 F.2d 344, 344 (1st Cir. 1975) (holding that a Little League, a state actor, could not categorically exclude girls); *Hoover v. Meiklejohn*, 430 F. Supp. 164, 164 (D. Colo. 1977) (holding that a high school could not constitutionally exclude a girl from the only boy's soccer team on the basis of gender alone); *Clinton v. Nagy*, 411 F. Supp. 1396, 1400 (N.D. Ohio 1974) (holding that the Equal Protection Clause required a municipal football league to let a qualified girl play).

215. 1996 CLARIFICATION, *supra* note 15; see also *Brake*, *supra* note 141, at 139–40 (calling this a “modest concession” because “[f]ew female athletes will be able to affirmatively demonstrate enough interest and ability to support a viable team in a contact sport [in which they] have been denied access to any school-supported competition”).

216. *Brake*, *supra* note 141, at 145 (citing *Sangree*, *supra* note 154, at 434–35); see also *FIELDS*, *supra* note 35, at 161 (suggesting that “[t]he [regulation's] exclusion of females from contact sports was symbolic of the exclusion of females from power”).

217. For example, University of Iowa Head Football Coach Kirk Ferentz deflected criticism of a personal foul penalty called against his linebacker: “That’s football. We’re not wearing skirts . . . Believe me, if he wanted to drill him he could have drilled him.” Andrew Logue, *Criticized Hawkeyes Fire Back*, DES MOINES REG., Nov. 9, 2005, at C1. Along the same lines, the University of Iowa's decision to accommodate opposing football teams in an all-pink visitors' locker room—described by one reporter as “Barbie's Dream House on acid”—is a symbolic gesture of the same point that contact sports like football and femininity are mutually exclusive. See Sean Keeler, *Hayden Lives On: Visitors' Quarters Still Pretty in Pink*, DES MOINES REG., Aug. 21, 2005 (describing the pink locker room).

218. 34 C.F.R. § 106.41 (b) (2005).

feminine, and bolsters the construction of a dominant masculinity in sport."<sup>219</sup>

*b. Expenditures on Sports Teams*

The regulations allow schools to continue to heap large sums of money and favorable treatment on men's teams. This sends clear signals to women about how much less their participation is, literally, valued. The regulations expressly state that OCR will not judge compliance with the equal-opportunity requirement by whether a school makes equal aggregate expenditures to its men's and women's programs.<sup>220</sup> Thus, the implementing regulations to Title IX do nothing to close the persisting gap between the operating budgets for men's and women's sports.<sup>221</sup>

The regulations enumerate the factors OCR will consider in determining whether schools are providing equal treatment to their men's and women's athletics programs—factors such as travel and per diem expenses, compensation of coaches, and housing and dining services.<sup>222</sup> However, the regulations do not require men's and women's programs to match up evenly in these areas. OCR explains that not requiring equal aggregate expenditures allows universities to take into account "unique aspects of particular sports or athletic activities"<sup>223</sup> when setting budgets for men's and women's programs. In other words, some sports are just inherently more expensive than others, and universities should have the flexibility to account for this. But as a result of this regulatory choice, universities have no legal incentive to eliminate disparities in coaching salaries,<sup>224</sup> equipment room access, number of training tables, and other indicia of quality of athletic opportunities that are available to female

219. Brake, *supra* note 141, at 140.

220. 34 C.F.R. § 106.41(c).

221. Division I schools spend nearly twice as much—on average, almost \$3 million more—on men's sports than on women's sports. Women, on average, make up 54% of the enrolled student population. Welch Suggs, *Some Men's Teams Are in Peril in Division I-A*, CHRON. HIGHER EDUC., June 18, 2004, at A34 tbl. 1; *see also* Welch Suggs, *Small Colleges Spent 41 % of Sports Budgets on Women's Teams*, CHRON. HIGHER EDUC., June 18, 2004, at A35 tbl.1 (reporting that colleges in NCAA Division III, where women comprise an average of 58% of the student population, collectively spend only 41% of their athletic budgets on women's sports, about \$137,000 less than they spend on men's).

222. 34 C.F.R. § 106.41(c)(2)–(10).

223. 1979 Policy Interpretation, *supra* note 9, at 71,415 (acknowledging that "for the most part these factors will occur in programs offering football, and consequently these differences will favor men").

224. Suggs, *Gender Quotas*, *supra* note 71, at A24 (reporting that, at schools in NCAA Division I-A, men's teams have one and a half times as many coaches, and those coaches make more than twice what women's coaches make).



athletes today.<sup>225</sup> Female athletes and outside observers may read these inequities, in the aggregate, as institutionalizing the inferior status of women's sports.

*c. Scholarships*

The regulations measure scholarship equity by whether the share of women's scholarships is proportionate to women's overall athletic participation.<sup>226</sup> A school may provide relatively fewer scholarships for female athletes as long as it provides them relatively fewer opportunities overall. By one report, women receive \$142 million less in scholarships than men.<sup>227</sup> This disparity puts an actual dollar value on how much less institutions "value" female athletes, and it does so permissibly under Title IX. These disparities "reinforce[]" notions of male entitlement" in athletics.<sup>228</sup> As signals of women's athletics relative (lower) value, the disparity in scholarship money "contribute[s] to the construction of interest in sport in a way that is not gender neutral."<sup>229</sup>

*d. Backlash Against Title IX*

To the extent that Title IX does compel or at least motivate schools to close the gap in participation between men and women, such progress is accompanied by backlash that (often intentionally) reinforces the gender hierarchy of sports.<sup>230</sup> Pervasive rhetoric maintains that Title IX is "reverse discrimination"<sup>231</sup> that benefits female athletes only at the expense of men.<sup>232</sup> This erroneous<sup>233</sup> belief has fueled political and judicial challenges

225. *E.g.*, UNIV. OF IOWA, 2004-2005 DIVISION I ATHLETICS CERTIFICATION SELF-STUDY INSTRUMENT 52, 55-59 (2005), available at <http://www.uiowa.edu/~our/ncaa-cert/steering/051017fulldraft.pdf> (reporting inequities along these lines).

226. 34 C.F.R. § 106.37(c).

227. Brake, *supra* note 141, at 76.

228. *Id.* at 81.

229. *Id.* at 82.

230. See Susan L. Greendorfer, *Title IX Gender Equity, Backlash and Ideology*, WOMEN IN SPORT & PHYSICAL ACTIVITY J., Spring 1998, at 69, 73, 80-90. In the context of Title IX, Greendorfer explains that "[b]acklash emerges because resulting changes would be disruptive to the existing patriarchy[y] that is manifest in sporting practice." *Id.* at 83. Moreover, backlash itself reinforces the dominant patriarchy of sports. *Id.* at 86 ("The very suggestion that the legal mandate is unfair to men reasserts a construction of sport as male and intimates that male interests should prevail.").

231. *Id.* at 84.

232. This rhetoric is as old as Title IX itself. Male coaches and administrators publicly objected to draft implementing regulations based on fears that they would "bankrupt" men's athletic programs. See FESTLE, *supra* note 139, at 127-29. It is worth noting that this criticism came at a time when only 30,000 women competed at an intercollegiate level, college athletic departments allocated 2% of budgets to women's sports, and women's athletic scholarships were unheard of. See generally WOMEN'S SPORTS FOUND.: TITLE IX AT 30: ATHLETICS RECEIVE C+, *supra* note 8. This Report Card underscores Greendorfer's conclusion that Title IX backlash,

to the proportionality prong of OCR's compliance test.<sup>234</sup> Women themselves have been maligned by male administrators, coaches, and players in response to their efforts to secure equal treatment in athletics.<sup>235</sup>

## 5. The Effect of Opportunity on Interest and Participation

The cumulative effect of the antinormalizing factors discussed in this section is to suppress women's interest and participation in sports. Scholars have analyzed the ways in which gender-coding of particular opportunities influences women's interest in pursuing them. For example, in her analysis of sex segregation in the workplace, Professor Vicki Schultz presents sociological research suggesting that women do not determine their interest in a job independent of the job market itself.<sup>236</sup> When women in a particular job do not receive the same rewards as men in the same position, or when they see that job opportunities in that field are rare, they tend to develop, or

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"premised on [a] doctrine of male superiority and privilege . . . ignores the fact that . . . the sporting status quo [is] the cultural consequence of discrimination and ideological socialization." Greendorfer, *supra* note 230, at 84.

233. In the 1990s, men's teams were cut more frequently than women's teams, *see* COMMISSION REPORT, *supra* note 6, at 19, but in recent years men's athletics overall has gained opportunities, not lost. *See* Suggs, *Gender Quotas*, *supra* note 71 (reporting that the Department of Education's most recent data shows men's college athletic opportunities increased "by about 2,700 between 2002-3 and 2003-4, and the number of men's teams either increased or remained steady across all divisions").

To the extent that minor men's sports are getting squeezed, it is false to attribute this to women's sports and Title IX rather than the big budget, big roster sports like men's football and basketball that cause the disparities, and the budget crunches to begin with. *Id.*; *see also* John R. Thelin, *Good Sports? Historical Perspective on the Political Economy of Intercollegiate Athletics in the Era of Title IX, 1972-1997*, 71 J. HIGHER EDUC. 391, 399-401 (2000) (describing in detail the increasing expenditures associated with football—including money spent to buy out coaches' salary contracts when they fail to win championships; aggressive recruitment and scholarship distribution; putting players, coaches and staff up at hotels on the eve of home games; providing year-round training tables and luxurious locker rooms; net expenses associated with going to a Bowl Game; and noting in this context that "expanded athletic department expenses cannot be explained wholly or even primarily by the increased expenses of women's athletic programs").

234. Nat'l Wrestling Coaches Ass'n v. Dep't of Educ., 366 F.3d 930, 936 (D.C. Cir. 2004), *cert. denied*, 125 S. Ct. 2537 (2005) (dismissing for lack of standing wrestling coaches' claims that Title IX discriminates against male athletes); Chalenor v. Univ. of N.D., 291 F.3d 1042, 1043, 1049 (8th Cir. 2002) (rejecting an argument by male athletes that the proportionality prong operated as a reverse-discrimination measure); COMMISSION REPORT, *supra* note 6, at 24-25.

235. For example, after the University of Texas agreed to double the number of female athletes (increasing their percentage from 23% to 44% of all athletes) to settle Title IX litigation brought by seven female athletes, Texas players and coaches faced public criticism, harassment, and charges of lesbianism. FESTLE, *supra* note 139, at xxvi-xxviii.

236. *See generally* Shultz, *supra* note 141. Professor Brake compares Shultz's factors influencing women's interest in jobs traditionally held by men to those that contribute to women's interests and abilities in sports. Brake, *supra* note 141, at 73-74.

at least report, other interests.<sup>237</sup> Efforts to preserve the hegemonic masculinity of a particular job are also successful at suppressing women's interests in those jobs.<sup>238</sup> Just as offering women opportunities inferior in quantity and quality suppresses interest, making opportunities available for women has the opposite effect.

For example, Professor Schultz notes that women who work in blue-collar trades and in jobs that are traditionally held by men often cite the employer's affirmative action as the reason they pursued that particular line of work.<sup>239</sup> In a similar vein, Professor Kimberly Yuracko explains that "because of the salience of gender-group membership, girls respond differently when they see a woman doing something than they do when they see a man doing the same thing."<sup>240</sup> Consequently, "female athlete role models allow girls to develop an alternate vision in their own minds of who and what they can become, and of what socially valued versions of themselves might look like."<sup>241</sup> More significantly, she argues, athletic opportunities for women, distributed in proportion to women's numbers on campus, help "change the social meaning attached to femaleness" and the cultural association of sport and masculinity.<sup>242</sup>

In light of the different ways in which medical, social, educational and legal structures have constructed women's relationship to athletics, the effect of opportunity on women's interest in sports is clear. For example, women are likely to respond to the lack of opportunities to play intercollegiate football<sup>243</sup> by channeling their interests elsewhere, and they develop an interest in playing football in much lower numbers than men. When women perceive that they have lower chances of earning a scholarship than men, and when differentials in the operating budget and coaches' salaries imply the second-class treatment of their sports, women's interests develop in directions where equal treatment is more likely. Alternatives to sports may also be more appealing to women who are deterred by the still-extant hegemonic masculinity of sports, or the related risk of being stigmatized as unfeminine, gay, or both, or the requisite self-sexualization to preempt that stigma.

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237. For example, in a study of secretaries, respondents "adjusted to their realistically nonexistent possibility of advancement by rating the desirability of promotion relatively low." Shultz, *supra* note 141, at 1829.

238. Shultz describes how sexual harassment is an effort to either weed women out or make those who stay on the job "feel out of place," like "freaks" or "deviants," and "enables men to continue to define their work (and themselves) in masculine terms." *Id.* at 1837.

239. *Id.* at 1829.

240. Yuracko, *supra* note 15, at 792. Yuracko uses the role-modeling argument and other perfectionist rationales to defend Title IX's proportionality requirement. *Id.* at 799–800.

241. *Id.* at 793.

242. *Id.* at 795–96.

243. For a proposal to introduce women's intercollegiate football, see generally Rodney K. Smith, *Solving the Title IX Conundrum with Women's Football*, 38 S. TEX. L. REV. 1057 (1997).

## B. TITLE IX AND STRUCTURALISM

To the extent that Title IX has reduced the discrimination against women in college and university athletics, it has been because the three-prong policy was written and interpreted in such a way that compliance measured under the second and third prongs was difficult to attain and sustain. This has nudged universities toward prong one, proportionality compliance. A university cannot sustain compliance with prong two's requirement of a history *and continuing practice* of program expansion for very long without further increasing participation opportunities for women, ultimately arriving at the proportionality endpoint. Prong three, the focus of this Part, is written to prevent university athletic departments from justifying existing gender disparities on grounds that women are less interested in sports than men. In fact, every federal appellate court that has considered this "relative interest" approach has rejected it by insisting that if a university were to hinge its compliance on prong three, it had to "fully" accommodate women's interests and abilities, consistent with the express language of the 1979 Policy Interpretation.<sup>244</sup> Further, courts that have considered the nature of evidence a university may use to show compliance, or on which a plaintiff may rely to prove noncompliance, have helped sustain prong three's high compliance bar.<sup>245</sup>

As a mere exercise in giving meaning to every word in OCR's three-prong policy, the courts' interpretation of prong three does not necessarily embody structuralism. Rather, it is in rationalizing why interest-defined compliance should not be so easy that the courts recognize, at least in general terms, the powerful social forces that construct women's interests in athletics.<sup>246</sup>

This results in some doctrinal tension, however. Insisting that prong three compliance remains difficult to attain actually validates prong three's theoretical existence. Indeed, no court has suggested that prong three itself is inconsistent with Title IX or the U.S. Constitution—only rejected the watered-down versions of prong three put forth by university defendants or stymied male athlete plaintiffs. Yet the structuralist rationale the courts

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244. *Neal v. Bd. of Trs. of Cal. State Univs.*, 198 F.3d 763, 767–69 (9th Cir. 1999); *Cohen v. Brown Univ. (Cohen II)*, 101 F.3d 155, 176 (1st Cir. 1996); *Kelley v. Bd. of Trs., Univ. of Ill.*, 35 F.3d 265, 270 (7th Cir. 1994); *Cohen v. Brown Univ. (Cohen I)*, 991 F.2d 888, 899 (1st Cir. 1993); *Roberts v. Colo. State Bd. of Agric.*, 998 F.2d 824, 830 (10th Cir. 1993).

245. *Pederson v. La. State Univ.* 213 F.3d 858, 878–79 (5th Cir. 2000); *Cohen II*, 101 F.3d at 179–80.

246. See, e.g., *Neal*, 198 F.3d at 769 ("Title IX has altered women's preferences, making them more interested in sports, and more likely to become student athletes . . . . Adopting [an] interest-based test for Title IX compliance would hinder, and quite possibly reverse, the steady increases in women's participation and interest in sports that have followed Title IX's enactment."); *Cohen II*, 101 F.3d at 179 (noting that "[i]nterest and ability rarely develop in a vacuum, [but] evolve as a function of opportunity and experience").

employ in support of their rejection of a relaxed version of prong three undermines any form of interest-defined compliance, no matter how interest is measured or defined.

The 1993 decision in *Cohen v. Brown University*<sup>247</sup> is, both by its own description and any objective measure, the “watershed”<sup>248</sup> decision about equal athletic opportunity under Title IX. It was the first case to reject a university’s attempt to justify its disproportionate athletic offerings on the grounds that women were less interested in athletics than men. In 1991, Brown University announced the elimination of four intercollegiate athletic teams as a cost-cutting measure: women’s volleyball, women’s gymnastics, men’s golf, and men’s water polo.<sup>249</sup> Gymnasts and volleyball players—representing a class of all present and potential Brown University female student athletes—won an injunction ordering the reinstatement of their teams.<sup>250</sup> On appeal, the First Circuit Court of Appeals affirmed<sup>251</sup> the district court’s decision that, under the preliminary injunction standard, the plaintiffs were likely to prevail on their claim that Brown’s decision violated Title IX. After a trial on the merits, the district court ruled that Brown’s intercollegiate athletics program violated Title IX,<sup>252</sup> and the First Circuit affirmed that decision.<sup>253</sup>

Even before the cut, Brown’s percentage of female athletes was far from proportionate to its percentage of female students.<sup>254</sup> Brown also had a weak and spotty record of expanding women’s athletics.<sup>255</sup> The litigation therefore focused on whether Brown fully and effectively accommodated women’s interests and abilities, in compliance with the third prong of OCR’s policy.<sup>256</sup> Brown argued that it could satisfy the third prong by providing athletic opportunities to women “*in accordance with the ratio of interested and able women to interested and able men*,”<sup>257</sup> and that if the policy did not allow for compliance to be measured this way, then the policy violated both Title IX

247. *Cohen I*, 991 F.2d at 888.

248. *Id.* at 891.

249. *Id.* at 892.

250. *Cohen v. Brown Univ.*, 809 F. Supp. 978, 1001 (D.R.I. 1992).

251. *Cohen I*, 991 F.2d at 907.

252. *Cohen v. Brown Univ.*, 879 F. Supp. 184, 214 (D.R.I. 1995).

253. *Cohen v. Brown Univ. (Cohen II)*, 101 F.3d 155, 180 (1st Cir. 1996).

254. During the preliminary injunction hearing, the statistical disparity was 10.9%, as women made up 36.7% of Brown’s athletes and 47.6% of its enrolled undergraduates. However, even after Brown reinstated volleyball and gymnastics to satisfy the injunction, the statistical disparity increased to 13.01%, because while the percentage of female athletes rose to 38.13%, the percentage of women students rose to 51.14%. *Id.* at 163.

255. Brown added a number of women’s teams in the 1970s after it merged with all-women’s Pembroke College, but the only team added “after this period was winter track, in 1982.” *Id.*

256. *Cohen I*, 991 F.2d at 903–04.

257. *Id.* at 899.

and the U.S. Constitution.<sup>258</sup> The First Circuit rejected Brown's arguments in both its first and second opinions on the case.<sup>259</sup>

The First Circuit rejected Brown's proposal to measure prong-three compliance in terms of relative interest as inconsistent with the policy's requirement that women's athletic interest and abilities be "fully and effectively accommodated" for an institution to comply under the third prong. The court held that this "myopic" view "reads the 'full' out of the duty to accommodate 'fully and effectively'" women's interests and abilities in athletics.<sup>260</sup> In the face of Brown's disparate distribution of athletic opportunities between men and women and its lack of progress in expanding opportunities for women, the seemingly gender-neutral decision to eliminate two women's teams and two men's teams violated Title IX.<sup>261</sup> The court acknowledged that relying on prong three to measure compliance with Title IX may require a university "to give the underrepresented gender (in this case, women) what amounts to a larger slice of a shrinking athletic-opportunity pie."<sup>262</sup>

The First Circuit also insisted that its reading of the policy conformed to Title IX's "unmistakably clear mandate that educational institutions not use federal monies to perpetuate gender-discrimination."<sup>263</sup> Because "interest and ability rarely develop in a vacuum, [but they] evolve as a function of opportunity and experience,"<sup>264</sup> interest-defined compliance would "limit[] . . . program expansion for the underrepresented sex to the status quo level of relative interests" and would "entrench and fix by law the significant gender-based disparity in athletic opportunities [that] exist[s] at Brown."<sup>265</sup> Further explaining its rejection of interested-defined compliance, the court noted:

To assert that Title IX permits institutions to provide fewer athletics participation opportunities for women than for men, based upon the premise that women are less interested in sports

258. *Id.* at 899–900.

259. *Id.*; see also *Cohen v. Brown Univ. (Cohen II)*, 101 F.3d 155, 175–76 (1st Cir. 1996).

260. *Cohen I*, 991 F.2d at 899.

261. Put more colorfully, "even balanced use of the budget-paring knife runs afoul of Title IX where, as here, the fruits of a university's athletic program remain ill-distributed after the trimming takes place." *Id.* at 906.

262. *Id.*; see also *Cohen II*, 101 F.3d at 176 (quoting *Cohen I* for same). The First Circuit Court of Appeals also acknowledged deference to the policy as a "plausible, if not inevitable, reading of Title IX," affirming that the three-prong test as a whole is reasonably constructed to meet the statute's goal of determining whether a student has been excluded from participation in or denied the benefits of an athletic program. *Cohen I*, 991 F.2d at 899; see also *Cohen II*, 101 F.3d at 173 (citing *Cohen I* for same).

263. *Cohen I*, 991 F.2d at 907; see also *Cohen II*, 101 F.3d at 176 (citing *Cohen I* for same).

264. *Cohen II*, 101 F.3d at 179.

265. *Id.* at 174 (quoting the district court opinion, *Cohen v. Brown Univ.*, 879 F. Supp. 184, 209 (D.R.I. 1995)); *id.* at 176, 180.

than are men, is (among other things) to ignore the fact that Title IX was enacted in order to remedy discrimination that results from stereotyped notions of women's interests and abilities.<sup>266</sup>

Brown also challenged the constitutionality of Title IX, arguing that if Title IX authorized a regulatory policy that required full accommodation of women's interests and abilities but not men's interests and abilities, then the statute would violate the Equal Protection Clause of the Fifth Amendment.<sup>267</sup> The First Circuit held that, in the absence of any evidence to the contrary, Congress and OCR reasonably based the legislation and regulations on a view that "women, given the opportunity, will naturally participate in athletics in numbers equal to men."<sup>268</sup> Specifically, the court said, "[w]hile it might well be that more men than women at Brown are currently interested in sports, Brown points to no evidence in the record that men are any more likely to engage in athletics than women, absent socialization and disparate opportunities."<sup>269</sup>

The First Circuit's adamant rejection of the relative interest theory did not stop parties to Title IX litigation in other jurisdictions from advancing the same argument. Colorado State University ("CSU") defended its decision to cut women's softball<sup>270</sup> by arguing that it cut men's baseball at the same time.<sup>271</sup> CSU maintained that women's unmet interest and ability (measured by the number of disappointed softball players) was relative to men's (measured by the number of disappointed baseball players) and, therefore, permissible under the third prong.<sup>272</sup> However, the Tenth Circuit Court of Appeals, citing *Cohen I*, determined that the third prong measures absolute interest, not relative unmet interest, when it came to women's athletics.<sup>273</sup> Therefore, the fact that CSU terminated an established, healthy women's team easily satisfied the court that the university was not accommodating women's interests and abilities in athletics.<sup>274</sup>

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266. *Id.* at 178–79.

267. The Fifth Amendment's equal protection provision was at issue because Title IX was enacted pursuant to Congress's spending power, U.S. CONST. art. I, § 8, rather than its power to enforce the Fourteenth Amendment's equal protection guarantee. U.S. CONST. amend. XIV, § 5.

268. *Cohen I*, 991 F.2d at 900.

269. *Id.*

270. Like the *Cohen* plaintiffs, Jennifer Roberts and her co-plaintiffs easily established that CSU failed to satisfy prongs one and two because the proportion of athletic opportunities for women and enrolled female undergraduates differed by 10.5%, and CSU had a history and continuing practice of contracting, rather than expanding, opportunities for women. *Roberts v. Colo. State Bd. of Agric.*, 998 F.2d 824, 830 (10th Cir. 1993).

271. *Id.* at 831.

272. *Id.*

273. *Id.* (citing *Cohen I*, 991 F.2d at 898).

274. *Id.* at 832 n.11 (citing *Cohen I*, 991 F.2d at 904).

The next year, relying on the First and Tenth Circuit decisions, the Seventh Circuit Court of Appeals impliedly rejected a relative interest approach to prong-three compliance when it held that the University of Illinois's decision to eliminate its men's swimming team—but not its women's swimming team—was a “reasonable response to the requirements of the applicable regulation and policy interpretation.”<sup>275</sup> The Seventh Circuit thus recognized prong three as an absolute, not relative, prohibition against unmet interest among women athletes when it noted that, had Illinois terminated women's swimming, it would have failed prong three, as “women with a demonstrated interest in an intercollegiate athletic activity and demonstrated ability to compete at [that] level would be left without an opportunity to participate in their sport.”<sup>276</sup>

When the Ninth Circuit Court of Appeals considered the relative interest theory, it did so at the plaintiffs' behest. Wrestlers at Cal State-Bakersfield claimed that the University's decision to cap its men's wrestling team, pursuant to a consent decree, violated Title IX.<sup>277</sup> The wrestlers argued that “gender-conscious remedies are appropriate only when necessary to ensure that schools provide opportunities to males and females in proportion to their relative levels of interest in sports participation.”<sup>278</sup> Nonetheless, the Ninth Circuit insisted that the plaintiffs' proposed qualification of interest would be inconsistent with Title IX, since “requiring only that each gender's expressed interest in participating be accommodated equally would freeze the inequality of the status quo.”<sup>279</sup> The court continued:

Title IX [envisions] equal opportunity for all athletes and recognizes that, where society has conditioned women to expect less than their fair share of the athletic opportunities, women's interest in participating in sports will not rise to a par with men's overnight . . . . Title IX has altered women's preferences, making them more interested in sports, and more likely to become student athletes . . . . Adopting [an] interest-based test for Title IX compliance would hinder, and quite possibly reverse, the steady

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275. *Kelley v. Bd. of Trs., Univ. of Ill.*, 35 F.3d 265, 270 (7th Cir. 1994). The University of Illinois failed proportionality compliance by more than twenty percentage points and did not have a history and continuing practice of expanding athletic opportunities for women. *See id.* at 269.

276. *Id.* at 270.

277. *Neal v. Bd. of Trs. of Cal. State Univs.*, 198 F.3d 763, 765–66 (9th Cir. 1999).

278. *Id.* at 767.

279. *Id.* at 769–70 (citing *Cohen v. Brown Univ. (Cohen II)*, 101 F.3d 155, 178–79 (1st Cir. 1999)).



increases in women's . . . sports that have followed Title IX's enactment.<sup>280</sup>

In addition to rejecting a relative approach to measuring accommodation of women's interests and abilities under prong three, courts have also considered what types of evidence can properly establish compliance or noncompliance with that test.<sup>281</sup> Again, their reasoning on this part reflected the view that when it comes to using interest levels to define compliance, Title IX requires that a high bar must be set.

In its second decision in *Cohen v. Brown University*,<sup>282</sup> the First Circuit rejected the argument that statistical evidence alone could suffice as a measure of compliance with prong three. The court wrote that "there exists the danger that, rather than providing a true measure of women's interest in sports, statistical evidence purporting to reflect women's interest instead provides only a measure of the very discrimination that is and has been the basis for women's lack of opportunity to participate in sports."<sup>283</sup> Acknowledging that Title IX and its regulations permit statistics derived from an interest survey to measure interests and abilities for the purposes of determining whether an institution complies with prong three, it rejected the argument that this statistical evidence "standing alone" can justify "providing fewer opportunities for women than for men."<sup>284</sup> Significantly, the First Circuit rejected the very method for measuring interest—statistical evidence "standing alone"—that OCR would later sanction in 2005.<sup>285</sup>

280. *Id.*

281. *Cohen II*, 101 F.3d at 179–80; *Pederson v. La. State Univ.*, 213 F.3d 858, 878–79 (5th Cir. 2000).

282. *Cohen II*, 101 F.3d at 155.

283. *Id.* at 179.

284. *Id.* at 179–80. This section is arguably dictum; the court was clear that even if such evidence was reliable, it was "irrelevant where, as here, viable and successful women's varsity teams have been demoted or eliminated." *Id.* at 180.

285. While the First Circuit's express rejection of *Brown's* attempt to rely on statistical evidence alone, *see id.* at 179–80, does not bode well for the 2005 Clarification, it does not necessarily mean that the 2005 Clarification is doomed to a similar fate. Unlike a university, OCR is entitled to deference for any regulatory construction that is not "arbitrary, capricious, or manifestly contrary to the statute." *Chevron U.S.A. Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 844 (1984).

However, courts will extend somewhat less deference to an agency's policy interpretation of its own regulations. *See Christensen v. Harris County*, 529 U.S. 576, 588 (2000) (suggesting that opinion letters and other policies are entitled to respect but not deference). Even after *Christensen*, federal appellate courts have continued to apply *Chevron* deference to the three-prong policy, because OCR promulgated the policy using formal rulemaking procedures. *See Miami Univ. Wrestling Club v. Miami Univ.*, 302 F.3d 608, 615 (6th Cir. 2002); *see also Chalenor v. Univ. of N.D.*, 291 F.3d 1042, 1046–47 (8th Cir. 2002) (deferring to OCR's three-prong policy because it interpreted an ambiguous regulation). But because the 2005 Clarification is a policy interpretation rather than a formally promulgated regulation, courts are likely to apply *Christensen* respect rather than *Chevron* deference to determine whether the 2005 Clarification is a permissible construction of Title IX.

While the First Circuit adopted a restrictive view of the type of evidence a university might put forth to prove compliance with prong three, the Fifth Circuit adopted a permissive view of what a plaintiff must demonstrate to show that a university is not complying.<sup>286</sup> Female Louisiana State University ("LSU") students and erstwhile athletes sued LSU challenging, among other things, its failure to field a women's fast-pitch softball team (at any level) as a violation of Title IX.<sup>287</sup>

The district court found the requisite level of women's interest and ability based on a variety of evidence. First, LSU had a women's fast-pitch softball team from 1979 until 1983, when it was disbanded by the university.<sup>288</sup> Second, since that time, national, regional, and local interest in women's fast-pitch softball had increased at both the high school and intercollegiate level.<sup>289</sup> Third, the plaintiffs testified that they were interested in and capable of competing on an intercollegiate softball team at any level of competition.<sup>290</sup> When LSU complained to the Fifth Circuit that this evidence did not sustain the plaintiffs' burden of proving noncompliance with prong three,<sup>291</sup> the court called LSU "brazen[]." <sup>292</sup> The court saw LSU's defense as an argument that an "institution with no coach, no facilities, no varsity team, no scholarships, and no recruiting in a given sport must have on campus enough national-caliber athletes to field a competitive varsity team in that sport before a court can find sufficient interest and abilities to exist."<sup>293</sup> The court refused to adopt such criteria, which would "eliminate an effective accommodation claim by any plaintiff at any time."<sup>294</sup>

The above discussion shows how courts have consistently rejected efforts to water down prong-three compliance and have required schools that have not attained proportionality compliance to fully accommodate women's interests in athletics—even if it means granting immunity from lawsuits challenging budget-driven decisions to terminate men's teams. There are, effectively, two strains of reasoning that the courts espouse in support of this conclusion. First, the courts recognize that anything less than full accommodation of women's interests (absent proportionally distributed

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286. *Pederson v. La. State Univ.*, 213 F.3d 858, 878–79 (5th Cir. 2000).

287. *Id.* at 864.

288. *Pederson v. La. State Univ.*, 912 F. Supp. 892, 915 (M.D. La. 1996), *rev'd*, 201 F.3d 388 (5th Cir. 2000), *superseded and vacated by panel on reh'g*, 213 F.3d 858 (5th Cir. 2000).

289. *Id.*

290. *Id.*

291. With a twenty-point disparity between the percentage of athletic opportunities for women (29%) and the percentage of women enrolled as undergraduates (49%), LSU flunked the substantial proportionality prong by as many percentage points as Brown and CSU combined. *Pederson*, 213 F.3d at 878. Nor did LSU have a history and continuous practice of expanding women's athletics programs. *Id.* at 879.

292. *Id.* at 878.

293. *Id.*

294. *Id.*

athletic opportunities) relies on—and validates—the stereotype that women are less interested in athletics than men, an assumption that is inconsistent with Title IX.<sup>295</sup> Had the courts stopped here, their reasoning would reflect basic formal equality by insisting on similar treatment for similarly situated (interested) women and men—free of the stereotypes about women's interest.<sup>296</sup> As Professor Vicki Shultz explains, such a theory is problematic because it is only concerned with individual women who happen to develop an interest in nontraditional work or sports *notwithstanding* the social structures operating to suppress that interest.<sup>297</sup> This absolves the regulated institution (an employer, an educational institution) from having to provide opportunity in order to generate interest among women.<sup>298</sup>

However, the courts did more than just insist that it was impermissible to rely on stereotyped notions about women's interests in sports. Instead, they recognized that any attempt to measure that interest would reflect the effects of "socialization and disparate opportunities."<sup>299</sup> Additionally, the courts recognized that just as lack of opportunities<sup>300</sup> suppresses interest, providing opportunities to women generates their interest in sports.<sup>301</sup>

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295. The *Cohen II* court stated:

To assert that Title IX permits institutions to provide fewer athletic participation opportunities for women than men, based upon the premise that women are less interested in sports than are men, is (among other things) to ignore the fact that Title IX was enacted in order to remedy discrimination that results from stereotyped notions of women's interests and abilities.

*Cohen v. Brown Univ.*, 101 F.3d 155, 178–79 (1st Cir. 1996); *see also* *Neal v. Bd. of Trs. of Cal. State Univs.*, 198 F.3d 763, 768 (9th Cir. 1999) (citing *Cohen II* for same).

296. This reasoning does not necessarily proscribe institutions from using something other than stereotypes to justify a conclusion that women are less interested in athletics than men. Courts allowed favorable treatment to women's teams relative to men's—i.e., giving them a "larger piece" of the shrinking pie. *See* *Cohen v. Brown Univ.*, 991 F.2d 888, 906 (1st Cir. 1993); *Kelley v. Bd. of Trs., Univ. of Ill.*, 35 F.3d 265, 272 (7th Cir. 1994) ("Allowing a school to consider gender when determining which athletic programs to terminate ensures that in instances where overall athletic opportunities decrease, the actual opportunities to the underrepresented gender do not."). Such an outcome could be justified solely by the defendant's failure to make a case that something other than stereotypes were at play, and distinguished from future cases in which something other than stereotypes might be proffered in support of relative interest.

297. Shultz, *supra* note 141, at 1807–08.

298. *Id.*

299. *Cohen I*, 991 F.2d at 900; *see also* *Cohen II*, 101 F.3d at 179 (suggesting that statistical evidence of women's interest in sports is likely to reflect women's lack of opportunity).

300. *See* *Pederson v. La. State Univ.*, 213 F.3d 858, 878 (5th Cir. 2000) (recognizing that evidence of interest in softball among LSU women was likely to be sparse, as there was "no coach, no facilities, no varsity team, no scholarships, and no recruiting"); *Cohen II*, 101 F.3d at 179 (noting that "interest and ability rarely develop in a vacuum; they evolve as a function of opportunity and experience").

301. *Neal v. Bd. of Trs. of Cal. State Univs.*, 198 F.3d 763, 769 (9th Cir. 1999) ("Title IX has altered women's preferences, making them more interested in sports.").

This second, structuralist-influenced view<sup>302</sup> bolsters the courts' conclusion that relative interest theories and evidence standards that favor universities should not water down prong-three compliance. The Ninth Circuit even expressly suggested that an "interest-based test for Title IX compliance would hinder, and quite possibly reverse, the steady increases in women's participation in sports that have followed Title IX's enactment."<sup>303</sup> Inconsistently, however, the courts have left prong three intact, inviting future courts, OCR, and the regulated community to infer that interest, properly measured and defined, can justify something less than proportionality compliance.

C. 2005 CLARIFICATION ABANDONS THE STRUCTURALIST EQUALITY OF TITLE IX

*If female students are satisfied with the fact that their university offers relatively fewer athletic opportunities to women than to men, how can the university be discriminating against women?*

The 2005 Clarification reduces Title IX's application to college athletics to this answer-begging question, which itself reveals the policy's conceptual flaw. Even under the best possible survey conditions—widespread, careful participation by all relevant respondents<sup>304</sup>—the very concept of using survey responses to set participation rates for women is inconsistent with Title IX's anti-discrimination mandate.

Discrimination persists, as the courts have held, when universities accept and perpetuate stereotypes about women's interests in athletics. By introducing the Model Survey, the 2005 Clarification gives universities an alternative to relying on stereotypes. In this way, the 2005 Clarification attempts<sup>305</sup> to espouse a basic formal equality—treating sports-drawn women similarly to sports-drawn men. However, the 2005 Clarification is incompatible with the courts' additional, structuralist reasoning. The courts understood that gender stereotypes contributed to a deficit in both the number and nature of existing athletic opportunities for women, and that no measure of interest, particularly a survey, can control for the effect of this deficit on women's reported interest.<sup>306</sup>

302. The Ninth Circuit cited Note, *supra* note 141, at 1640–41, and Bredthauer, *supra* note 211, at 1107, to support the causal connection between opportunity and interest. *Neal*, 198 F.3d at 769.

303. *Neal*, 198 F.3d at 769.

304. For arguments why this is unlikely, see *supra* Part II.

305. I explain in *infra* Part III.D why even if the survey method proposed in the 2005 Clarification could identify similarly situated individuals, it still fails to provide similar treatment.

306. *Cohen v. Brown Univ.*, 101 F.3d 155, 180 (1st Cir. 1996) ("[Empirical] evidence, standing alone, cannot justify providing fewer athletics opportunities for women than for men.").

Women's responses to the questions "are you interested" and "are you capable"—the key questions in the Model Survey—will inevitably reflect the medical, social, educational, and legal structures that have socially constructed women's perceived limited interest in sports.<sup>307</sup> Using these results to determine a university's compliance obligation perpetuates these interest-suppressing structures and therefore contravenes the anti-discrimination mandate of Title IX.

The 2005 Clarification also upends the three-prong policy by allowing schools to rely comfortably on prong three as an end-point for compliance. In the past, schools that satisfied prong three notwithstanding lopsided athletic offerings still had motivation to strive for proportionality under prong one. Prong three's former approach incorporated a variety of factors, including regional trends, as well as qualitative and quantitative measures of student interest.<sup>308</sup> The increase in a particular sport's popularity within the community or a rise in the number of students or applicants who expressed an interest in that sport (factors difficult for a university to control and predict) could expose the school to an enforcement action by OCR judicial action. In contrast, prong-one proportionality compliance—though more difficult to achieve for schools with low percentages of female athletes, high percentages of female students, or both—offers a truly safe haven. Once a school brings women's relative representation in the athletics program close to its relative female representation on campus, it can reasonably expect to successfully defend its program's offerings against regulatory or judicial scrutiny. Moreover, unlike the pre-2005 factors contributing to a prong-three determination, the factors contributing to proportionality compliance are within the university's control (as with the number of participation opportunities offered to women and men) and easier to predict (as with the gender breakdown of the student body<sup>309</sup>).

The 2005 Clarification makes prong three into an equally attainable safe haven. So long as the results of the survey do not reveal an entire team's worth of women interested and capable of competing in a particular sport, the university is assured that those statistics will insulate it from Title IX liability. The factors courts consider in prong-three compliance, once indeterminate and beyond the university's control, are now just as predictable and manageable as the factors contributing to proportionality. Relying on the questionable causal connection between opportunity and

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307. See *supra* Part III.A.

308. OCR's complete list of factors contributing to a determination of unmet interest is set forth in *supra* note 57 and accompanying text.

309. For example, the National Center for Education Statistics predicts that women's enrollment will increase 22% between 2000 and 2013 and that men's enrollment will increase 15% in that same time period. NAT'L CTR. FOR EDUC. STATISTICS, PROJECTIONS OF EDUCATION STATISTICS TO 2013 (Oct. 2003), available at <http://nces.ed.gov/programs/projections>.

interest,<sup>310</sup> a university can anticipate that the Model Survey results will show relatively low interest among women in sports that the university does not offer. Further, by failing to increase offerings in women's sports, a university can deter women interested in that sport from applying for admission and enrolling.

This second criticism reflects deficiencies in prong three and the 2005 Clarification. By various courts' own reasoning proffered against watered-down versions of prong three,<sup>311</sup> they should have condemned prong three entirely rather than simply nullifying its effects by making it harder and less desirable to attain. It is no wonder colleges and universities complain that they are confused by what Title IX requires.<sup>312</sup> On one hand, OCR continues to insist that the three-prong test is flexible,<sup>313</sup> that each prong is an "equally sufficient means of complying with Title IX,"<sup>314</sup> and that "no one prong is favored."<sup>315</sup> On the other hand, OCR, bolstered by the courts, has made compliance under prongs two and three difficult to attain and to sustain.

*D. 2005 CLARIFICATION DOES NOT REQUIRE SIMILAR TREATMENT  
FOR MEN'S AND WOMEN'S SPORTS*

Not only is the newly clarified prong three incapable of accurately defining a class of "sports-interested women" for the purpose of comparing their treatment to that of sports-interested men, it fails to provide that class of women equal treatment to similarly situated male counterparts.

Pursuant to the 2005 Clarification, universities may now set participation levels for women—or more accurately, justify existing disparities in participation—based on the responses of its enrolled female students. That universities recruit many, or in some cases most, of their athletes—male and female alike—shows the senselessness of making program expansion for women contingent on survey responses from a self-selected pool of nonrecruits.<sup>316</sup> By expecting sports-interested women to express interest and ability in nonexistent opportunities, the 2005 Clarification treats them differently than sports-interested men.

At schools where the 2005 Clarification and prong-three compliance is relevant, male students participate in sports at a higher rate than women, because those schools cannot satisfy prong-one proportionality. In setting men's participation levels, a university does not require men to show up to nonexistent opportunities before they are deemed "interested." It decides

310. See *supra* Part II.B.

311. *Supra* Part III.B.

312. COMMISSION REPORT, *supra* note 6, at 25–26.

313. 1996 CLARIFICATION, *supra* note 15; 2003 CLARIFICATION, *supra* note 20.

314. 2003 CLARIFICATION, *supra* note 20.

315. *Id.*

316. See *supra* Part II.B.2 (arguing that the target population is illogical).

whether to continue to field a men's team based on the men who have shown up to play, including many who were recruited by the university's own affirmative efforts.<sup>317</sup> In contrast, pursuant to the 2005 Clarification, the university can make its decision about whether there is sufficient interest to field a women's team without considering the effect that more opportunities and affirmative recruiting would have on getting interested women to enroll. The policy does not ensure neutral treatment of male and female athletes, because men get the benefit of a presumption of higher interest. Women have to prove theirs.<sup>318</sup>

#### IV. A PROPOSAL FOR REFORM

As the last Part explained, interest-defined compliance has always conceptually defied Title IX. For the last twelve years, however, courts have minimized this problem by enforcing a construction of prong three that made it a difficult and uncertain measure of compliance.<sup>319</sup> This, in turn, made prong one a more attractive alternative. The criticism aimed at the 2005 Clarification, which changed prong three by making it easier to achieve and more reliable as a bulwark to litigation, exposes the latent tension lurking in the three-prong policy itself: on one hand, a structuralist-inspired progress-seeking push toward prong one proportionality compliance, and on the other, the potential for structuralism-defying, status-quo-sustaining, interest-defined compliance. As a result of this tension, any proposal for reform must go beyond repealing the 2005 Clarification and address the problems inherent in the three-prong policy that cause universities and other Title IX skeptics to agitate for reform.

This Part first explores the sources of confusion underlying OCR's three-prong policy. Then, it suggests two alternative means for reform in addition to merely repealing the 2005 Clarification that would alleviate the latent tension without violating structuralist-equality principles. One way is

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317. As a percentage of the overall student athlete population, female athletes are actually more likely to have been recruited than male athletes, because football teams offer many opportunities for walk-ons. DONNA LOPIANO, WOMEN'S SPORTS FOUND., EQUITY IN WOMEN'S SPORTS—A HEALTH AND FAIRNESS PERSPECTIVE, <http://womenssportsfoundation.org/cgi-bin/iowa/issues/rights/article.html?record=121> (last visited Feb. 24, 2006). However, even the average Division I football team, with thirty-two walk-on players, has eighty-five recruited scholarship players. ANDREW ZIMBALIST, WOMEN'S SPORTS FOUND., FISCAL RESPONSIBILITY, NOT WEAKENING CIVIL RIGHTS LAW, IS KEY TO TITLE IX COMPLIANCE AND DETERRING INSTITUTIONS FROM DISCONTINUING SOME MEN'S SPORTS TEAMS (Dec. 2002), <http://womenssportsfoundation.org>. Assuming those eighty-five men account for some of the proportionality differential, these recruited players are getting preferential treatment (the presumption of their interest) as compared to the women who could have been recruited for a complementary women's program in football or some other sport.

318. See Jocelyn Samuels & Kristen Galles, *In Defense of Title IX: Why Current Policies Are Required to Ensure Equality of Opportunity*, 14 MARQ. SPORTS L. J. 11, 39 (2003).

319. See *supra* Part III.B.

to re-clarify the three-prong policy in a way that endorses proportionality under prong one as the only favored means of long-term compliance with Title IX. Or OCR could adopt an alternative fourth prong that would be a suitable endpoint for compliance, such as proportionality of aggregate expenditures on women's and men's athletics programs.

A. *SOURCES OF CONFUSION: MIXED MESSAGES AND INTELLECTUAL INCONSISTENCY*

OCR has repeatedly emphasized the flexibility inherent in three equally favored prongs with which colleges and universities can choose to demonstrate Title IX compliance. At the same time, before the 2005 Clarification, OCR and the courts rejected universities' efforts to water prong-three compliance down to a test of relative interest demonstrable by survey evidence alone. As discussed above, the courts have essentially decided that for interest-defined compliance to be permissible, it must effectively be unattainable, at least as a compliance endpoint.

OCR's 2005 Clarification reconciles this tension but, as argued above, in a manner that is inconsistent with Title IX. If the First Circuit's distrust of "statistical evidence, without more"<sup>320</sup> is any indication, courts may be willing to forgo the deference they have repeatedly extended to OCR's implementing regulations under Title IX.<sup>321</sup> Alternatively, OCR could cave under political pressure over time and repeal the 2005 Clarification itself.

Even if OCR rescinds the 2005 Clarification, without additional modification of the three-prong compliance policy, the agency will continue to send mixed messages about the nature of the three-prong test. College and university athletic departments will go right back to wondering why prong three, if it is as equally favored as OCR keeps insisting, remains a more difficult and less reliable measure of compliance than prong one? They will continue to report "confusion" over the three-prong policy,<sup>322</sup> and OCR will continue to issue "clarifications" that do not contain any real clarity.<sup>323</sup> This will continue to distract both sides from the necessary task of devising equitable, fiscally responsible, and politically acceptable solutions for Title IX compliance.

B. *RE-CLARIFICATION*

The solution could be as simple as an express admission from OCR that prong three is *not* equally favored. Instead, OCR could declare prong three,

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320. *Cohen v. Brown Univ.*, 101 F.3d 155, 179 (1st Cir. 1996).

321. See *supra* note 285 (explaining that federal appellate courts have applied traditional *Chevron* deference to OCR's three-prong policy, but will likely examine the 2005 Clarification with greater scrutiny because it did not result from a formal rulemaking process).

322. COMMISSION REPORT, *supra* note 6, at 25–26.

323. 2003 CLARIFICATION, *supra* note 20 (reiterating the flexibility of the three-prong test and reminding regulated universities that no one prong is favored).



like prong two, to be an interim compliance measure that affords universities immunity until they ultimately reach proportionality compliance. Such a clarification would be consistent with the courts' view that prong three cannot be satisfied when interested and able female athletes are denied the opportunity to play.<sup>324</sup> It would also explain why universities must rely on a variety of qualitative and fluid factors to measure interest. OCR should make clear that prong three is unappealing *on purpose*; it does not want universities to rely on it forever. This approach would basically collapse the three-prong policy into a proportionality test with two alternatives for interim compliance.

A new policy mandating (or clarifying) that prong-one proportionality is the mandatory compliance endpoint could be challenged as beyond the scope of Title IX or Congress's authority to remedy past discrimination. The courts that have upheld the three-prong policy have avoided arguments that mandatory proportionality contravenes the statute or the Constitution by pointing out that proportionality is one of three choices for compliance.<sup>325</sup> However, while the legality of a mandatory proportionality policy is uncertain, it is defensible. Congress may exercise otherwise-constitutional authority to provide a remedy for past discrimination without running afoul of the equal protection principles in the Due Process Clause of the Fifth Amendment,<sup>326</sup> as long as Congress has authorized a remedial measure that is substantially related to an important government interest.<sup>327</sup> The courts that have considered the constitutionality of Title IX as construed by the three-prong test have recognized that ending the legacy of gender discrimination in extracurricular activities, such as athletics, is an important

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324. See *supra* Part III.

325. *Cohen II*, 101 F.3d at 171 (concluding that the proportionality prong is constitutional in part because "it is but one aspect of the inquiry into whether an institution's athletics program complies with Title IX"); *Kelley v. Bd. of Trs., Univ. of Ill.*, 35 F.3d 265, 271 n.6 (7th Cir. 1994) ("We express no opinion as to whether, if the policy interpretation did in fact mandate substantial proportionality, it would be unconstitutional or in contravention of the statute.").

326. *Kelley*, 35 F.3d at 272; *Cohen v. Brown Univ.*, 991 F.2d 888, 901 (1st Cir. 1993). Congress enacted Title IX under its authority deriving from the Spending Clause, U.S. CONST. art. I, § 8, cl.1. See generally *Jackson v. Birmingham Bd. of Educ.*, 554 U.S. 167 (2005). As a federal statute, Title IX must comply with the Fifth Amendment Due Process Clause, which protects citizens from equal protection violations by the federal government to the same extent that the Fourteenth Amendment protects citizens from equal protection violations by states. See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 217-18 (1995).

327. *United States v. Virginia*, 518 U.S. 515, 558 (1996); *Kelley*, 35 F.3d at 272 (applying intermediate scrutiny to Title IX); see also *Cohen II*, 101 F.3d at 183-84. *Cohen II* did not reconsider the *Cohen I* court's decision upholding the constitutionality of Title IX as construed by the three-prong policy. It considered whether the district court's remedial order was itself a violation of the Equal Protection Clause of the Fourteenth Amendment and acknowledged that the equal protection guarantee of the Fifth Amendment was coextensive with the Equal Protection Clause of the Fourteenth. *Cohen II*, 101 F.3d at 182 n.20.

government objective.<sup>328</sup> They have also found Title IX and the three-prong compliance policy substantially related to that objective.<sup>329</sup>

Mandatory proportionality is equally related to the important government objective of ending the legacy of gender discrimination in college athletics. In fact, it is a more appropriate means of satisfying that objective than the three-prong test. The three-prong test allows universities to offer disproportionate opportunity so long as they fully accommodate what they believe to be women's interests and abilities. However, as this Article has explored, interest in athletics is disproportionately lower among female students because of the socially constructed antinormalization of women's participation. This, in turn, is rooted in "fixed notions concerning the roles and abilities of males and females,"<sup>330</sup> or "overbroad generalizations about the different talents, capacities, or preferences of males and females."<sup>331</sup> Until women and girls have been allowed to participate in athletics on equal terms as men and boys, Congress can reasonably infer that women's disproportionately low interest in athletics results, ultimately, from "fixed notions" and "overbroad generalizations" about gender. Therefore, it can constitutionally assent to a regulatory policy that seeks to equalize the distribution of those opportunities.<sup>332</sup>

#### C. PROPORTIONATE EXPENDITURES: A FOURTH PRONG OF COMPLIANCE?

Instead of affirming proportionality as the single favored prong, OCR could offer university athletic departments true flexibility by offering them another manner of compliance that would be suitable as an endpoint for

328. *Kelley*, 35 F.3d at 272; *see also* *Neal v. Bd. of Trs. of Cal. State Univ.*, 198 F.3d 763, 767–69 (9th Cir. 1999); *Cohen II*, 101 F.3d at 184 (finding an important government objective of "avoid[ing] the use of federal resources to support discriminatory practices") (internal citation omitted).

329. *Neal*, 198 F.3d at 772; *Cohen II*, 101 F.3d at 184; *Kelley*, 35 F.3d at 272 (protecting the interest of the disproportionately burdened gender satisfies equal protection). These courts were focused not so much on the question of the constitutional proportionality requirement, but the interpretation of the third prong of compliance that protected women's teams at institutions where proportionality was not met.

330. *Virginia*, 518 U.S. at 541 (quoting *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 725 (1982)).

331. *Id.* at 533, 541; *see also supra* Part III.A.

332. Even if proportionality was overbroad as a remedy, owing to doubts that men's and women's relative interest in athletics was anything but the same, it would still be an appropriate means to enforce the antidiscrimination mandate. Unlike other contexts subject to remedial antidiscrimination measures, such as employment and educational opportunities generally, Congress has endorsed separate men's and women's sports. In order to set up a scheme in which, contrary to our instincts, separate actually means equal, it is appropriate to construe Title IX as insisting on equitable allocation of resources. *Cf. Kelley*, 35 F.3d at 271 (noting, in dicta, that "once it is agreed Title IX does not require that all teams be co-ed . . . schools must be provided some means of establishing that despite offering single-sex teams, they have provided 'equal athletic opportunit[ies] . . . for both sexes'").

compliance. Under this approach, prong two and prong three (the pre-2005 version) would both be available for universities to use as interim compliance measures, or stopover points on the way to prong one or four.

To be consistent with Title IX, the regulatory policy as interpreted by the courts, and the structuralist-equality principles attendant to Title IX, this hypothetical “fourth prong” would measure whether universities have “accommodated the interests and abilities of both sexes”—the prong-three regulatory standard that Congress has endorsed—by taking into account the role that universities themselves have played, and continue to play, in constructing women’s interests in athletics. It would insist that universities ultimately comply with Title IX in a manner that does not suppress women’s interest in athletics by sanctioning a distribution of resources that appears to favor men.

Under this hypothetical prong four, courts would not judge an institution’s athletic offerings to be discriminatory under Title IX when, if they are not proportional in number, they are at least proportional in nature. If a university can demonstrate that its aggregate expenditures to men’s and women’s athletic programs are substantially proportionate to their respective enrollments, it would also comply with Title IX’s mandate of nondiscrimination in athletic participation. Equal distribution of financial resources is an appropriate measure of nondiscrimination under Title IX because it puts the burden on the university to signal equal respect for women’s and men’s sports (crucial as one considers that lack of athletic opportunities at a college level have suppressed women’s interest in sports) rather than put the burden on women to self-generate interest in order to warrant the opportunity to play.

Currently, Title IX’s regulations allow OCR to consider whether universities equitably support their men’s and women’s programs, but they do not require that universities provide funding in a manner proportionate to enrollment.<sup>333</sup> In fact, the implementing regulations expressly state that compliance does not require equitable aggregate funding, which has resulted in large disparities in the scholarships and operating budgets for men’s and women’s sports.<sup>334</sup> Prong four would not require equitable funding—it would be an option, an alternative to providing proportional opportunities under prong one.<sup>335</sup> Therefore, OCR would not need to

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333. 34 C.F.R. § 106.41(c) (2005). As noted in Part I.A, *supra*, the implementing regulations rely on other factors, primarily participation opportunity, to determine whether separate athletic programs for men and women are in some sense equal.

334. See *supra* note 224 and accompanying text (reporting that Division I schools spend nearly twice as much on men’s sports than on women’s sports).

335. Of course, just as OCR has done under prong one, it should not mandate strict proportionality of spending under prong four. A range of substantial proportionality should be allowed to account for reasonable differences in the costs of different sports.

overhaul its regulations and modify the compliance policy to include prong four.

To be consistent with the structuralist-equality principles, prong four must measure and compare gross rather than net expenditures. Especially at Division I colleges, football and men's basketball programs generate revenue, and some threatened programs, like wrestling, have attracted the attention of potential donors.<sup>336</sup> If prong four measured and compared only the expenditures not offset by revenue, many schools that do not comply with prong one now would automatically comply with prong four without having to change their spending or athletic offerings in any way.<sup>337</sup>

However, how much a private donor might decide to kick in to support his or her favorite sport, or how much the public is willing to pay for tickets to an Iowa/Michigan football game,<sup>338</sup> have no place in the compliance formula. The relatively higher revenue-generating potential of certain men's sports derives from the very social forces that suppress women's interest and participation. Thus, prong four is only an appropriate compliance endpoint under Title IX if it asks whether a university is fairly treating its male and female students through aggregate gross expenditures, separate from external, socially constructed market demands that enable men's sports to generate comparatively more revenue.

To be sure, universities face a higher burden under prong four when revenue is left out of the equation. Different sports have different costs associated with them. Market demands may force a university to spend more to hire a coach for its men's basketball team than its women's basketball team. Some of its revenue-generating men's teams may have to travel more frequently than women's teams in order to participate in the most competitive conferences. It simply may cost more to play football than crew, baseball than softball, men's basketball than women's basketball. In light of the different costs associated with different sports, universities that do not wish to curb spending on men's sports (especially those like football and basketball with the potential to generate revenue) may find it difficult to impossible to come close to proportional spending for its women's

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336. *Chalenor v. Univ. of N.D.*, 291 F.3d 1042, 1048 (8th Cir. 2002) (rejecting that an offer from a private donor to fund a wrestling team exempted the university from proportionality compliance, noting that donor-funded discrimination would be attributable to the university: "Once a university receives a monetary donation, the funds become public money, subject to Title IX's legal obligations in their disbursement.").

337. For example, some universities where football is profitable would easily satisfy a compliance test that compared net expenditures rather than gross expenditures. I confirmed this by reviewing data reported to the Department of Education under the Equity in Athletics Disclosure Act of 1994, which is compiled and reported by the Chronicle of Higher Education, <http://chronicle.com/stats/genderequity/2004/> (last visited Feb. 24, 2006).

338. The cost of a ticket to the 2005 game was sixty dollars. See Hawkeye Sports, <http://www.hawkeyesports.collegesports.com/tickets/iowa-tickets.html> (last visited Feb. 22, 2006).

programs. But this real concern is addressed by the flexibility principle espoused by OCR and preserved with this proposal for reform. A university unwilling or unable to ensure equity in expenditures does not have to do so. It can ensure equity in participation opportunities, that is, comply with prong one, instead.

The remainder of this subpart discusses six reasons why proportionality in gross expenditures on women's and men's sports would be an appropriate method of compliance with Title IX.

### 1. A Proportionate-Expenditure Prong Respects the Structuralist Model of Equality Reflected in Title IX

Equitable funding is an appropriate measure of nondiscrimination because it, like proportionality, does not rely on women's constructed relative interest to justify favored treatment for men's sports. A university that complies with this proposed prong four is not complicit in the social structures that antinormalize women's participation in sports because proportionate funding sends a signal, measured in dollars instead of numbers, to female students that it equally values their collective participation.

### 2. A Proportionate-Expenditure Prong Would Help Control Excessive Spending

Many blame rampant excessive spending in high-profile men's sports, like football, for the financial constraints that cause universities to struggle with Title IX compliance.<sup>339</sup> Commentators have described football expenditures as an "arms race"—whatever spending one program does to gain a competitive edge on the field or to curry favor with recruits, other programs must match if they want to stay in the game.<sup>340</sup> Luxury locker rooms, indoor practice facilities, lavish recruiting events, and buying out the contracts of coaches who fail to win championships are all examples of excessive spending that have driven up the cost of running competitive intercollegiate football programs.<sup>341</sup> Some have argued that big-budget items

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339. See, e.g., Robert C. Farrell, *Title IX or College Football?*, 32 HOUS. L. REV. 993, 1055–57 (1995); Rich Haglund, *Staring Down the Elephant: College Football and Title IX Compliance*, 34 J.L. & EDUC. 439, 448–51 (2005) (exposing the "well-traveled myth that football funds other athletic opportunities for male and female athletes" and suggesting that reducing the number of football scholarships and otherwise trimming football-associated expenditures are viable alternatives to eliminating nonrevenue men's teams); Daniel R. Marburger & Nancy Hogshead-Makar, *Is Title IX Really to Blame for the Decline in Intercollegiate Men's Nonrevenue Sports?*, 14 MARQ. SPORTS L.J. 65, 91–92 (2003); Thelin, *supra* note 233, at 397, 399–401.

340. Farrell, *supra* note 339, at 1000–01; Haglund, *supra* note 339, at 442; Marburger & Hogshead-Makar, *supra* note 339, at 84–85; Thelin, *supra* note 233, at 399–401.

341. Farrell, *supra* note 339, at 1001; Haglund, *supra* note 339, at 442; Thelin, *supra* note 233, at 399–401. Roster size is also criticized as a source of bloated expenditures. Division I football teams now have more than one hundred players, eighty-five on scholarship. (In

like these are not only wasteful, but they blur the distinction between professional and amateur collegiate sport.<sup>342</sup>

Universities that are striving to comply with prong four would be motivated to curtail unnecessary spending in the men's program to offset some of the spending increases in the women's program. In fact, short of command-and-control legislation by Congress or the NCAA, the incentive of Title IX compliance could be the only force operating against the collective-action problem that has university athletic departments striving to outspend one another on recruiting, coaches' salaries, and facilities.<sup>343</sup> Prong four could help universities get spending under control and also restore college football's amateur character.

### 3. Compliance with a Proportionate-Expenditure Prong Is Based on Predictable Factors Under the University's Control

Like the factors contributing to a university's prong-one proportionality score, equitable funding is based on factors that are predictable and within a university's control. OCR or a reviewing court would have to engage in some subjective inquiry to ensure that a university is not attempting to pass off as general, unallocated expenditures money that is actually being spent on men's sports. However, as long as a university submits an honest and equal budget, it can be assured that neither a court nor OCR will find that its athletic program is discriminatory in violation of Title IX.

### 4. Equitable Funding Compliance Could Mitigate Backlash Against Title IX

Turning the dialogue to money instead of participation opportunities could also help militate against Title IX backlash and create a healthier dialogue about equity in sports. By focusing universities (and their constituents) on the real problem of inflated athletic department budgets, "trading" a male wrestler for a female volleyball player ceases to be the operative rhetoric. Instead, if the wrestling team loses an assistant coach or a training table due to budget cuts, it might notice that women's volleyball received a commensurate gain, but it will also notice that men's football has a staff of twenty-three. By changing the debate from one about athletes to dollars spent on various athletes, the hope is that men's sports will start

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contrast, NFL teams are half as large.) Farrell, *supra* note 339, at 1056-57 ("A team that is playing a game with 11 players on the field does not need 140 players or even 100 players. Professional teams in the National Football League have 47 players."). Big football rosters increase the number of women's opportunities a university must provide to attain proportionality compliance.

342. Farrell, *supra* note 339, at 998.

343. See COMMISSION REPORT, *supra* note 6, at 25 (acknowledging the need for national action to control the escalating costs of intercollegiate athletics).

comparing themselves to—and taking out their demands for equality on—the teams on their side of the ledger.

5. Universities that Comply with a Proportionate-Expenditure Prong Are Still Likely to Increase Participation Opportunities for Women

Even if proportionate expenditure, rather than proportionate opportunity, is a university's compliance objective, the university is still likely to continue to add participation opportunities for women. The larger the disparities between its expenditures for men's and women's programs (and the less it is willing to cut from the men's side of the ledger), the more it has to invest in women's sports to achieve equitable funding. Some of this reinvestment is just as likely to increase the quantity as well as the quality of participation opportunities for female athletes.

To be sure, once a university achieves proportionate expenditures, it would be free to add opportunities for men and cut opportunities for women, so long as the aggregate funding for men's and women's sports stays constant. But this possible reduction in athletic opportunities for women under this approach is defensible because it comes with a commensurate gain in the quality of opportunity. Proportionality compliance pressures athletic departments to stretch women's programs' relatively smaller budgets over as many female athletes as possible. Compared to an individual male athlete, a female athlete may have less access to coaching, support, training facilities, and meals. These inequities contribute to the perception that universities favor men's sports and, therefore, do not cultivate women's interest in sports to the same extent as men's. In an equitable funding regime, universities use dollars instead of an athlete headcount to demonstrate that they equally value women's athletics.

6. A Proportionate-Expenditure Prong Would Eliminate "Artificial" Caps and Floors

Another benefit to prong-four compliance is that it eliminates the pressure on universities to artificially cap the number of players on men's teams or expand the number of players on women's teams. Many schools opt to attain prong-one proportionality compliance through some combination of adding opportunities for women, while reducing the size of men's teams. Cuts on the men's side usually squeeze out the players who were not recruited. The Commission called this an "artificial" cap, noting that because these players do not cost the university any scholarship dollars, cutting their opportunities does not result in any commensurate benefit for women.<sup>344</sup> On the women's side, universities often add whole new teams, but

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344. See *id.* at 30. Cutting opportunities for walk-on players may be a politically problematic consequence associated with proportionality compliance, but it is not a legal problem. Title IX compels universities to end the discriminatory distribution of athletic opportunities, which can

they also sometimes require coaches to add more women to a team than the coach would prefer to carry.<sup>345</sup> If a university opted to satisfy proportionate expenditures instead of proportionate opportunity, the only limit to the size of its men's teams would be the size of its equalized budget.<sup>346</sup>

## V. CONCLUSION

The political debate about the Model Survey is, on the surface, a debate about methodology—*how* institutions should be allowed to demonstrate women's lack of interest in complying with Title IX. The 2005 Clarification policy should be repealed. As a survey, it is methodologically flawed. As a concept, it is destined to "provide[] only a measure of the very discrimination that is and has been the basis for women's lack of opportunity to participate in sports."<sup>347</sup>

However, the 2005 Clarification also helps expose two latent inconsistencies that have perpetuated confusion and political opposition to Title IX: first, the inconsistency between interest-defined compliance and structuralist equality; and second, the resulting inconsistency between the fact that the three-prong policy operates to favor proportionality and OCR's insistence that it is a flexible test. For Title IX's regulatory policy to be effective, OCR must resolve these inconsistencies by retreating from its rhetoric of flexibility regarding prong-three compliance and by offering institutions the option to rely on something other than women's interests as a benchmark for compliance.

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be achieved by bolstering opportunities for women or just as well by eliminating athletics altogether. *Kelley v. Bd. of Trs.*, 35 F.3d 265, 272 ("Title IX's stated objective is not to ensure that athletic opportunities available to women increase. Rather, its avowed purpose is to prohibit educational institutions from discriminating on the basis of sex."); *see also Chalenor v. Univ. of N.D.*, 291 F.3d 1042, 1048–49 (8th Cir. 2002).

345. *See, e.g.,* UNIV. OF IOWA, ATHLETICS REVIEW MERGER COMMITTEE FINAL REPORT 8 (Apr. 2005), available at <http://www.uiowa.edu/president/task-forces/athletics-merger/042505athletics-merger.pdf> (recommending that the University of Iowa consider roster floors as well as caps). Iowa found that coaches of its women's teams often prefer smaller teams because they cannot afford to stretch their budgets over many additional players. A school that equalizes funding between men's and women's programs would likely ameliorate this problem, giving coaches of women's teams the flexibility to take walk-on players if they wanted to.

346. If walk-on players truly do not cost universities anything, then rosters have no limit. But if, as one might suspect, there are costs associated with training, feeding, outfitting, gearing, and providing travel for these players (notwithstanding proportionality opponents' claims that they do not cost anything), these costs will influence a coach's decision on how many walk-on players a team can afford.

347. *Cohen v. Brown Univ.*, 101 F.3d 155, 179 (1st Cir. 1996).